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No. 011487

IN THE SUPREME COURT OF THE UNITED STATES

D. A. MAYLE, Warden, *Petitioner*,
v.
RICHARD N. BROWN, *Respondent.*

EDDIE YLST, Warden, *Petitioner*,
v.
ERNEST BRAY, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the California courts' determinations, that the Eighth Amendment permits punishment of felonious petty theft by a term of 25 years to life when the defendant has a violent criminal history, was "contrary to" or an "unreasonable application of" clearly established United States Supreme Court precedent?

2. Whether a state court adjudication is "contrary to" Supreme Court precedent when it cites to and discusses controlling United States Supreme Court authority, but does not explicitly discuss every factor stated in the controlling precedent?

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OPINIONS BELOW

The opinion of the court of appeals is not yet published, but can be found at 2002 WL 187415 (9th Cir. Feb. 7, 2002). A copy of the opinion is submitted as Appendix A. The district court's order in *Brown* is submitted as Appendix B, and the magistrate judge's findings and recommendations in *Brown* is submitted as Appendix C. The district court's order in *Bray* is submitted as Appendix D, and the magistrate judge's findings and recommendations in *Bray* is submitted as Appendix E.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was filed February 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES, OR REGULATIONS

United States Constitution, VIII Amendment.
Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA], Pub. L. No. 104-132, Stat. 1214, 28 U.S.C. § 2254, et seq.
California Penal Code §§ 666, 667, 1170.12 (App. O.)

STATEMENT OF THE CASE

A. California's Recidivist Statutes

California's Three Strikes law consists of a pair of substantively identical statutes both enacted in 1994, one by the California Legislature, Stats. 1994, ch. 12, § 1, and one by ballot initiative, Proposition 184 § 1, as approved by the voters, Gen. Elec. (Nov. 8, 1994). The purpose of the law is to impose longer terms of imprisonment on defendants with prior qualifying felony convictions or "strikes." *See generally In re Cervera*, 16 P.3d 176 (Cal. 2001). Under the law, only "serious" or "violent" felonies, as defined in the Penal Code, qualify as prior strikes. The principal or "triggering" offense, however, may be any felony under California law. When a defendant with two strikes is convicted of any felony, the Three Strikes law authorizes a sentence of 25 years to life. Cal. Penal Code §§ 667(e)(2)(A)(ii); 1170.12(c)(2)(A)(ii).

So-called "wobbler" offenses – offenses that can be either a misdemeanor or a felony, *see People v. Terry*, 54 Cal.Rptr.2d 769 (Cal. Dist. Ct. App. 1996) – may constitute a triggering offense. One such "wobbler" offense is petty theft with a prior theft conviction and imprisonment on that prior. This offense is punishable either as a misdemeanor by imprisonment in the county jail not exceeding one year, or as a felony punishable by a term in state prison. (Cal. Penal Code § 666.) Prosecutors have discretion to charge petty theft with a prior as either a misdemeanor or a felony, and the trial court has reviewable discretion to reduce the felony charge to a misdemeanor at the time of sentencing. *People v. Superior Court* (*Alvarez*), 928 P.2d 1171 (Cal. 1997). Trial courts also have reviewable discretion to strike prior serious or violent felony convictions. *People v. Superior Court* (*Romero*), 917 P.2d 628 (Cal. 1996).

B. *Brown v. Mayle*

Defendant Brown has an extensive criminal history that includes three juvenile offenses (all involving violence), six felony convictions (three involving violence), and 17 misdemeanor convictions (two involving violence). His most recent criminal conduct prompted this case.

On August 7, 1995, Brown attempted to steal a car anti-theft device from a Walgreens store in Stockton, California. As he exited the store, a security alarm sounded. Two uniformed security officers standing outside the store asked Brown to go back through the door to determine whether he "triggered" the alarm. Brown refused. Brown was then told that if he returned whatever merchandise he had taken, he could leave. Brown reached into his jacket and removed the stolen property. But as he was handing over the merchandise, Brown raised his hands and lunged toward the security officers as if he was going to push them. Brown's arms locked with the arms of one of the security officers, and a struggled ensued. Even after Brown was forced to the ground, he continued to struggle with the officers. (App. F [RT 117, 157-159, 168-169].)

A jury convicted Brown of petty theft with a prior theft conviction in violation of Penal Code section 666, a felony. The court found true the allegations that Brown had been convicted of two prior violent or serious felonies, both involving the use of violence. His first strike offense was for robbery. Significantly, Brown used a knife during the commission of the robbery and injured one of his victims. The second strike offense was for assault with a deadly weapon (a .22 caliber handgun) against his female victim. (CT 160, 188, 192, 194, 195.) The court also found true the allegation that Brown committed the offense while on bail or his own recognizance. (Cal. Penal Code § 12022.1) Brown was sentenced to 25 years to life pursuant to California's Three Strikes law.

On direct appeal, Brown argued that his sentence was disproportionate to his offense and therefore in violation of the federal and state constitutional prohibitions against cruel and unusual punishment. The California Court of Appeal affirmed. After reviewing in detail Brown's lengthy criminal history and crimes of violence, the court stated: "[D]efendant is a chronic thief and assailant whose behavior is an easy and appropriate fit within the habitual offender law. . . [¶] With respect to the federal Constitution, we simply note if a sentence of life without possibility of parole for a single offense of possessing more than 650 grams of cocaine is not disproportionate under the United States Constitution (see *Harmelin v. Michigan* (1991) 501 U.S. 957, 1009 [115 L.Ed.2d 836, 874]), a fortiori a term of 25 years to life for a person with defendant's record cannot be considered disproportional." (App. G.) Brown filed a petition for review with the California Supreme Court, which was denied. (App. H.) Brown later filed habeas petitions with the state superior court, Court of Appeal, and Supreme Court; the petitions were denied. (App. I, J, K.)

Brown then filed a petition for writ of habeas corpus in the federal district court. He alleged that his 25-years-to-life sentence amounted to cruel and unusual punishment. In accordance with the magistrate judge's recommendation, the district court denied habeas relief. (App. B, C.)

C. *Bray v. Ylst*

Defendant Ernest Bray has an extensive criminal history that includes four felony convictions (each a crime of violence), and four misdemeanor convictions. On March 28, 1994, Bray attempted to steal three videotapes from a Wherehouse records store in Long Beach, California.

A jury convicted Bray of petty theft with a prior theft conviction in violation of Penal Code section 666, a felony. The jury also found true the allegations that Bray had previously been convicted of four robberies, which were serious or violent

felonies. One of the robberies involved the use of a weapon by a co-defendant; in one of the other robberies, the victim was kicked and beaten. (CT 100-101, 134-135.) Pursuant to California's Three Strikes law, the court sentenced Bray to state prison for 25 years to life.

On direct appeal, Bray too argued that his sentence amounted to cruel and unusual punishment. The California Court of Appeal affirmed, and the California Supreme Court denied Bray's petition for review. (App. L, M.) Bray later filed a petition for writ of habeas corpus in the state superior court; the petition was denied. (App. N.)

Bray then filed a petition for writ of habeas corpus in the federal district court. He argued that his 25-years-to-life sentence constituted cruel and unusual punishment. The magistrate judge recommended that the petition be denied, and the district court adopted the recommendation. (App. D, E.)

D. The Ninth Circuit's Ruling In *Brown* and *Bray*

The Ninth Circuit's decision in this case followed, and expanded upon, its November 2, 2001 opinion in *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001), *petition for cert. filed* (Feb. 1, 2002) (No. 01-1127). In *Andrade,* the court held that the Eighth Amendment prohibited punishing defendant Andrade by a sentence of 50 years to life for his two current convictions for petty theft with a prior, where his criminal history consisted solely of non-violent offenses.[1]

The court found an inference of gross disproportionality, concluding that Brown's and Bray's cases are materially indistinguishable from *Andrade*. The court restated *Andrade's* reasoning that the 50-years-to-life sentence Andrade received was a much harsher penalty than the sentence

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1. After consolidating Brown's and Bray's cases, Professor Erwin Chemerinsky, who represents defendant Andrade, was appointed to represent Brown and Bray.

in *Rummel v. Estelle*, 445 U.S. 263 (1980), because Rummel would have been eligible for parole in 12 years or less. The *Andrade* court analogized the penalty to the sentence of life without possibility of parole in *Solem v. Helm*, 463 U.S. 277 (1983). Focusing on the "latest crime," *Andrade* concluded that shoplifting nine videotapes was comparable to the offense in *Solem* of uttering a no-account check. *Andrade* stated that since "the core conduct for which Andrade was sentenced is, in the first instance, classified as a misdemeanor rather than a felony," using petty theft with a prior theft conviction to serve as the third strike creates a "unique quirk," allowing a defendant's recidivism to be "double counted." Finally, the *Andrade* court noted that "[w]hile the Supreme Court frequently defers to legislative judgments regarding the proper length of imprisonment for felony offenses, it is less clear that the same degree of deference is appropriate when extreme sentences are imposed for misdemeanor conduct." *Andrade*, 270 F.3d at 760.

The court in this case extended the reasoning of *Andrade* to rule that Brown's and Bray's sentences were unconstitutional. The court found there was no material difference between Andrade's 50-years-to-life sentence, and Brown's and Bray's 25-years-to-life sentences. The court's reasoning was two-fold: first, Andrade's sentence was based on two petty theft convictions, whereas Brown's and Bray's were based on one; and second, Brown and Bray were "sentenced to indeterminate life sentences and *could* serve as long for their petty theft convictions as Andrade will for his two." The court also found it insignificant that both Brown and Bray have extensive criminal histories that include crimes of violence, stating that "the presence of violent prior offenses might well be of great significance were the crime of conviction a violent crime, but cannot be where the crime of conviction is non-violent."

The court analyzed Brown's and Bray's cases from an intrajurisdictional and interjurisdictional perspective, and

determined they were materially indistinguishable from *Andrade*.

The court concluded that a 25-years-to-life sentence for a defendant convicted of petty theft, with a prior theft conviction, is cruel and unusual punishment, regardless of whether the defendant has an extensive criminal history that includes repeated crimes of violence and other offenses that have harsh potentialities for violence. The court also held that the state courts' rulings upholding the sentences were "contrary to" and "unreasonable application[s] of" clearly established United States Supreme Court precedent within the meaning of section 2254(d)(1).

REASONS FOR GRANTING THE PETITION

California, through both legislation and ballot initiative, chose to punish felonious petty theft with a term of 25 years to life where the offender has two prior serious or violent felony convictions. The Ninth Circuit struck down that punishment, finding the Eighth Amendment precludes California from deciding that a current felonious petty theft marks the point at which these recidivists should be deemed to have demonstrated the necessary criminal propensities warranting their extended isolation from society. The decision conflicts with Supreme Court authority, and largely unanimous lower court authority, recognizing such a determination to be the province of the state.

The Ninth Circuit also interpreted and applied the terms "unreasonable" and "contrary to" in the AEDPA in a manner that essentially negates any deference to state court adjudications. In ruling that the decisions of the California Court of Appeals were "unreasonable," the Ninth Circuit ignored the uncertainties that presently exist concerning proportionality, use of priors in a recidivist scheme, and so-called "double counting" of prior offenses, and it disregarded

similarities between this case and *Rummel v. Estelle*, 445 U.S. 263 (1980). Its exceedingly broad interpretation of the term "contrary to" in 28 U.S.C. § 2254(d)(1) conflicts with the language of the statute, the decisions of nine federal circuit courts of appeals, and habeas principles established by this Court.

I.

THE NINTH CIRCUIT'S RULING PARTIALLY INVALIDATING CALIFORNIA'S THREE STRIKES LAW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL AND STATE APPELLATE COURTS, AND IGNORES THE DEFERENCE CONGRESS HAS AFFORDED STATE COURT DECISIONS.

This Court has identified some common principles that give content to the uses and limits of proportionality review. "[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)). Thus, "reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Harmelin*, 501 U.S. at 1016 (quotations omitted). "[O]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Solem v. Helm*, 463 U.S. 277, 289 (1983) (quoting *Rummel*, 445 U.S. at 272).

In *Rummel*, this Court held that a sentence of life imprisonment with an opportunity for parole after twelve years did not constitute cruel and unusual punishment where the defendant, convicted of obtaining $120.75 by false pretenses, had prior felony convictions for passing a no-account check and passing a forged check. In so holding, the Court emphasized that recidivist statutes punish not only the offense of conviction, but also the "propensities" of the defendant demonstrated by his

prior convictions for other crimes. *Rummel*, 445 U.S. at 283-285. The Court explained that "[t]he point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." *Rummel*, 445 U.S. at 285.

In *Solem*, the Court held that a sentence of life imprisonment without possibility of parole, imposed against a defendant convicted of uttering a worthless check in the amount of $100 and enhanced pursuant to a South Dakota recidivist statute, violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Solem*, 463 U.S. at 296-97. In reaching its decision, the Court enumerated several criteria to be considered in determining whether a sentence is unconstitutionally disproportionate to the offense: (1) the gravity of the offense relative to the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same offense in other jurisdictions. *Id.* at 292-94. The Court twice stated that its decision was consistent with *Rummel* and thus did not overrule it. *Solem*, 463 U.S. at 228 n.13, 303 n.32.

In *Harmelin*, this Court upheld a sentence of life imprisonment without possibility of parole against a defendant convicted of possessing 672 grams of cocaine. However, no majority opinion emerged on the question of proportionality. Justice Scalia's two-Justice (with Chief Justice Rehnquist) plurality concluded that there was no proportionality review under the Eighth Amendment except with respect to death sentences. Justice Kennedy's three-Justice concurrence (with Justices O' Connor and Souter) concluded that the Eighth Amendment contains a narrow proportionality principle, which was not confined to death penalty cases. Under this approach, the Eighth Amendment forbids only extreme sentences that are "grossly disproportionate" to the crime, and "intrajurisdictional and interjurisdictional analyses are appropriate only in the rare

case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1005.

A. The Ninth Circuit Disregarded The Limited Scope Of Habeas Corpus Review When It Held That The State Court Rulings Were "Contrary To" And "Unreasonable Applications Of" Clearly Established Supreme Court Precedent

The Ninth Circuit held that this Court's "clearly-established" Eighth Amendment precedent establishes that a sentence of 25 years to life may not be imposed against a petty thief, no matter how extensive or violent the thief's criminal history. Further, the Ninth Circuit held that it is "unreasonable" and "contrary to" this Court's directives for a California court to conclude otherwise.[2/] To the contrary, whether considered in isolation or together, none of this Court's authorities "clearly establishes" that the Eighth Amendment prohibits *any* particular sentence, less than life without any possible parole, to punish a recidivist for any particular current offense. By holding otherwise, the Ninth Circuit has frustrated Congress's effort to limit the role of federal courts engaging in habeas review. This Court's opinions do not suggest that the state courts' decisions were erroneous, let alone unreasonable; and the uncertainty in

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2. The Ninth Circuit adopted the doctrine of "clear error" as the precedential source for determining whether an erroneous application of federal law was unreasonable. *Van Tran v. Lindsey*, 212 F.3d 1143, 1153 (9th Cir. 2000). The correctness of this definition has been challenged by other federal courts. *Bell v. Jarvis*, 236 F.3d 149, 162 n.9 (4th Cir. 2000) (en banc), *cert. denied*, *Bell v. Beck*, ___ U.S. ___, 121 S. Ct. 74, 151 L. Ed.2d 39 (2001); *Francis S. v. Stone*, 221 F.3d 100, 110 (2d Cir. 2000); *see also Hennon v. Cooper*, 109 F.3d 330, 334 (7th Cir. 1997).

this area of the law makes it particularly inappropriate for the Ninth Circuit to have rejected the state courts' decisions as unreasonably applying "clearly established" law.

1. This Court has found it to be the normative province of a legislature, rather than the legal determination of a court interpreting the United States Constitution, to determine what punishment may be imposed for a specified offense. Thus, a legislature may punish by life imprisonment without parole a defendant who possesses 672 grams of cocaine, without respect to his criminal history. *Harmelin*, 501 U.S. at 957. And a legislature may punish by life imprisonment with possibility of parole after twelve years a defendant whose current offense is obtaining $120.75 by false pretenses, and whose criminal history consists of passing a "no-account" check and passing a forged check. *Rummel*, 445 U.S. at 263. It is only when a defendant was punished by life without possibility of parole for a minor offense and his prior crimes were all relatively minor, nonviolent offenses, that this Court found an Eighth Amendment violation. *Solem*, 463 U.S. at 277, 296-97. The Court has never suggested that a legislature could not punish a defendant's commission of a minor offense by life imprisonment, without necessarily the possibility of parole, if that offense followed the defendant's prior commission of violent crimes. The Court's concern, in fact, has been with the minor, non-violent nature of the prior offenses.

Of the three principal decisions of this Court on the issue, the one whose facts were closest to the present case was *Rummel* -- in which the Court *upheld* the sentence. As noted, in *Rummel*, the Court upheld a sentence of life imprisonment with an opportunity for parole after twelve years where the defendant, convicted of obtaining $120.75 by false pretenses, had prior felony convictions for passing a no-account check and passing a forged check. 445 U.S. at 263. The gravity of Brown's and Bray's present convictions for petty theft are of similar gravity to Rummel's conviction for obtaining $120.75

by false pretenses. Further, as was the case in *Rummel*, prosecutors in California have discretion to screen out truly petty offenders.[3/] Cal. Penal. Code §§ 667(f)(2); 1170.12(d)(2).

Indeed, this case provides even less grounds for constitutional objection than *Rummel*. Whereas Rummel's two prior convictions were for relatively minor, non-violent offenses, both Brown and Bray have extensive criminal records that include numerous crimes of violence. The California Court of Appeal labeled Brown "a chronic thief and assailant. . . ." (App. G.) Even some of Brown's non-violent criminal convictions -- burglary and driving under the influence of alcohol -- "had harsh potentialities for violence." *Solem*, 463 U.S. at 316 (Burger, J., dissenting, joined by Justices White, Rehnquist, and O' Connor). Moreover, Brown resorted to violence during the commission of the triggering offense; Rummel did not. *Solem*, 463 U.S. at 292-93 ("non-violent crimes are less serious than crimes marked by violence or the threat of violence").

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3. Although it is true that Rummel would have been eligible for parole in 12 years, whereas Brown and Bray must serve 25 years before becoming eligible for parole, that distinction is not significant. First of all, Rummel received a life sentence. The fact that he became *eligible* for parole in 12 years is not the equivalent of a 12 year sentence. *Rummel*, 445 U.S. at 280 (life sentence with possibility of parole in 12 years is not the "equivalent of a sentence of 12 years.") Moreover, as this Court noted in *Solem*, while "[i]t is clear that a 25-year sentence generally is more severe than a 15-year sentence, [ ] in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not." 463 U.S. at 294. And in any event, this single factor should not be dispositive on the Eighth Amendment question. *Solem*, 463 U.S. at 290 n.17

2. Uncertainty pervades this Court's jurisprudence regarding when a criminal sentence violates the Eighth Amendment on the ground that it is disproportionate to the offense. First, there is obvious uncertainty concerning the precise method by which a reviewing court should approach proportionality challenges in non-capital cases. *Compare Solem*, 463 U.S. at 277, *with Rummel*, 445 U.S. at 263. As Justice Kennedy recognized in *Harmelin*, 501 U.S. at 996, 998, Supreme Court "proportionality decisions have not been clear or consistent in all respects," and although the "decisions recognize a proportionality principle, its precise contours are unclear." Justice Kennedy also noted that while the type of punishment imposed is a prominent objective factor, "our decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years." *Id.* at 1001.

State and federal courts have found *Harmelin* casts doubt on proportionality review, even questioning whether *Solem's* proportionality test is still relevant in noncapital cases.[4/]

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4. *See also Henry v. Page*, 223 F.3d 477, 482 (7th Cir. 2000) (noting the "apparent confusion" over "whether *Solem* survives" *Harmelin*), *cert. denied*, 532 U.S. 959 (2001); *United States v. Cardoza*, 129 F.3d 6, 18 (1st Cir. 1997) (noting that *Harmelin* "casts doubt on the exact method by which a reviewing court should approach [proportionality] challenges in non-capital cases."); *United States v. Gonzales*, 121 F.3d 928, 942 (5th Cir. 1997) ("It is evident [ ] that the contours of the proportionality principle are less than pellucid."); *United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995) ("It may be somewhat unclear, in light of the Supreme Court's decision in *Harmelin*, whether *Solem's* three-part proportionality test is still relevant in noncapital cases."); *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994) ("[T]he holding of *Solem* has been put into doubt by *Harmelin v. Michigan*."); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509 (10th Cir.1993) ("*Harmelin* provides

Some federal courts of appeals, finding Justice Kennedy's concurring opinion to be controlling, have held that the Eighth Amendment guarantees some degree of sentencing proportionality. *See, e.g., United States v. Reynolds*, 215 F.3d 1210, 1214 (11th Cir.), *cert. denied*, 531 U.S. 1000 (2000); *United States v. Marks*, 209 F.3d 577, 583 (6th Cir.), *cert. denied*, 531 U.S. 882 (2000); *United States v. Bland*, 961 F.2d 123, 129 (9th Cir. 1992). Others continue to follow the full *Solem* test on the theory that "a majority of the *Harmelin* Court either declined expressly to overrule *Solem* or explicitly approved of *Solem*." *United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995); *see also Henry v. Page*, 223 F.3d 477, 481-82 (7th Cir. 2000), *cert. denied*, 532 U.S. 959 (2001). This spilt among the circuits has been noted by federal and state courts alike. *See, e.g., Hawkins v. Hargett*, 200 F.3d 1279, 1282 & n.1

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no guidance in articulating the proper approach for an Eighth Amendment analysis."); *United States v. Johnson*, 944 F.2d 396, 408 (8th Cir. 1991) ("The effect of *Harmelin* on the *Solem* proportionality factors is not entirely clear."); *Toulson v. Beyer*, 827 F. Supp. 307, 310 (D. N.J. 1993) ("It is presently unclear which, if either, of [the views in *Harmelin*] will ultimately prevail in the higher courts."), *aff'd*, 30 F.3d 1488 (3d Cir. 1994); *see also State v. Cotton*, 769 So.2d 345, 354 (Fla. 2000) ("the precise contours of the proportionality analysis are unclear"); *State v. Harris*, 844 S.W.2d 601, 602 (Tenn. 1992) ("the precise contours of the federal proportionality guarantee are unclear"); *Thomas v. State*, 916 S.W.2d 578, 582 (Tex. Crim. Appeal 1996) ("*Harmelin* left the law . . . in a confusing state," and "left much uncertainty in its wake"); *People v. Bullock*, 485 N.W.2d 866, 873 (Mich. 1992) ("It is unclear, in the wake of *Harmelin*, whether . . . *Solem's* analysis survives as a matter of federal constitutional law"); Thomas K. Landry, *"Punishment" And The Eighth Amendment,* 57 Ohio St. L.J. 1607, 1633 (1996) ("The exact test for proportionality is in flux.")

(10th Cir. 1999) (rejecting Fourth Circuit's position that *Harmelin* did not narrow *Solem*); *Wilson v. State*, ___ So.2d ___, 2001 WL 996175, *8 (Ala. Crim. App. 2001) ("Many federal courts of appeal have determined that Justice Kennedy's concurring opinion is controlling, . . . Some federal courts of appeals, however, continue to follow the three-part test announced in *Solem*, as if *Harmelin* did not limit the holding of that case or support a narrower approach to sentencing proportionality.")

Second, this Court has been unclear in specifying the weight prior convictions are given in assessing the constitutionality of a sentence imposed under a recidivist scheme. The Court in *Solem* held that, while the focus is on the felony that triggers the life sentence, the defendant's "prior convictions are relevant to the sentencing decision." *Solem*, 463 U.S. at 296 n.21. The Court, however, did not assign a precise relevance to prior convictions in general, or prior violent crimes in particular. Likewise, although this Court has held that "a State is justified in punishing a recidivist more severely than it punishes a first offender," *Solem*, 463 U.S. at 296, it has emphasized that, in order to avoid double-jeopardy concerns under recidivist sentencing schemes, "the enhanced punishment imposed for the present offense 'is not to be viewed as . . . [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" *Witte v. United States*, 515 U.S. 389, 400 (1995) (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)). This uncertainty prompted Justice Stevens in *Riggs v. California*, 525 U.S. 1114 (1999) (respecting the denial of a petition for writ of certiorari) to note that "[i]t is [] unclear how, if at all, a defendant's criminal record . . . affects the constitutionality of his sentence. . . ." This absence of authority has engendered confusion regarding the treatment of prior convictions in the cruel and unusual punishment determination, as is evinced by the Ninth Circuit's

refusal to give any meaningful weight to Brown's and Bray's extensive criminal histories, which include crimes of violence.

Finally, there is express uncertainty concerning the constitutional significance, if any, of using prior convictions both to elevate an otherwise misdemeanor offense to a felony, and also to calculate the length of incarceration under a recidivist sentencing scheme. In response to a prisoner's argument that this so-called "double counting" is unconstitutional, one court responded: "[T]he 'double counting' argument appears to be an entirely new twist on Eighth Amendment jurisprudence. It has certainly never been addressed by the full Supreme Court, and, as the opinions dissenting from denials of certiorari note, has not been developed in state or lower federal courts either. Under such circumstances, dual use of [a prior conviction] can hardly be said to violate rights that are clearly established by Supreme Court cases." *Smith v. Duncan*, 18 Fed. Appx. 556, 559, 2001 WL 1002858, *2 (9th Cir. Aug. 9, 2001) (unpublished disposition); *see also Riggs*, 525 U.S. at 1114 (noting the uncertainty of "double counting" recidivism on constitutionality of prison term imposed pursuant to California's Three Strikes law).

In ruling that the state courts' adjudications were unreasonable, the Ninth Circuit ignored the uncertainties that exist concerning proportionality, use of priors in a recidivist scheme, and so-called "double counting" of recidivism. The absence of such clear direction from this Court, particularly considered in light of the similarities that exist between this case and *Rummel,* refutes the Ninth Circuit's determination that the decisions of the California Court of Appeals were unreasonable applications of clearly-established Supreme Court precedent. In *Williams v. Taylor*, 529 U.S. 362, 411 (2000), this Court made clear that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established

federal law erroneously or incorrectly." The Ninth Circuit has disregarded that instruction from Congress and this Court.

B. The Ninth Circuit's Ruling Conflicts With California Appellate Authority, A Decision Of The Fifth Circuit, And The Decisions Of Numerous Other State Appellate Courts

Since California enacted its Three Strikes law in 1994, the California courts have uniformly and routinely rejected Eighth Amendment challenges to application of the law to defendants convicted of petty offenses. *See, e.g., People v. Terry*, 54 Cal.Rptr.2d 769 (Cal. Dist. Ct. App. 1996) (25-years-to-life sentence for petty theft with prior theft conviction not cruel and unusual punishment); *People v. Goodwin*, 69 Cal.Rptr.2d 576 (Cal. Dist. Ct. App. 1997) (25-years-to-life sentence for commercial burglary and petty theft with a prior theft-related conviction not cruel and unusual punishment). By refusing to grant review on the issue, the California Supreme Court has ensured affirmance of such sentences on direct appeal. The Ninth Circuit's ruling has therefore placed state prosecutors in an intolerable predicament – controlling state law permits them to apply the Three Strikes law, but if the defendant files a timely and proper habeas corpus petition with a federal court, the federal court will be obligated to issue the writ.

While every grant of federal habeas relief creates a "conflict" with a state court decision, the conflict here is of a different and more fundamental nature than that created by the typical case. This is not a question of differing views regarding whether, for example, a particular defense counsel rendered ineffective assistance under the facts of the case. At issue is the constitutionality of a regularly-applied statutory provision. This Court's intervention is necessary to resolve the federal-state disagreement over whether the Three Strikes law may be enforced against petty offenders.

The Ninth Circuit's resolution of this case also conflicts with Fifth Circuit authority. In *Smallwood v. Johnson*, 73 F.3d 1343, 1345 (5th Cir. 1996), the defendant's current offense of shoplifting property with a value of $27.64 was upgraded from a misdemeanor to a felony because of a prior theft conviction. Under Texas's habitual offender statute, the defendant's prior two felony convictions – for burglary and possession of a controlled substance – led to punishment of the current offense by a prison term of 50 years with parole eligibility in 12 years. *Id.* at 1346. The Fifth Circuit rejected the defendant's contention that his sentence constituted cruel and unusual punishment, finding the case materially indistinguishable from *Rummel*. *Id.* at 1348.

Finally, the Ninth Circuit's ruling conflicts with other state appellate court decisions upholding sentences of 25 years or more based on comparable offenses. *See, e.g., Cantu v. State*, 866 S.W.2d 647, 648-49 (Tex. Ct. App. 1993) (rejecting cruel and unusual punishment challenge to 25 year sentence for shoplifting a pair of shoes); *Smallwood v. State*, 827 S.W.2d 34 (Tex. Ct. App. 1992) (rejecting cruel and unusual punishment challenge to 50-year sentence for shoplifting meat worth less than $30); *Taylor v. State*, 511 N.E.2d 1036, 1038-39 (Ind. 1987) (rejecting cruel and unusual punishment challenge to 32-year sentence for stealing spark plugs worth less than $50); *Hensley v. State*, 497 N.E.2d 1053, 1055 (Ind. 1986) (rejecting cruel and unusual punishment challenge to 32-year sentence for petty theft of gasoline); *Caver v. State*, 466 So.2d 190, 192-93 (Ala. Crim. App. 1985) (rejecting cruel and unusual punishment challenge to 30-year sentence for shoplifting two pairs of pants).

C. The Ninth Circuit's Ruling Will Have An Enormous Adverse Impact On the State Of California And Its Citizens

The Ninth Circuit's decision may result in the early release of an estimated 331 prisoners incarcerated in California state prisons whose last offense of conviction was petty theft with a prior. Each of these 331 prisoners was previously convicted of *at least* two violent or serious felonies. Many, like Brown and Bray, were convicted of numerous *crimes of violence*. Should the Ninth Circuit ruling stand, 331 convicted felons, many with violent criminal pasts, may be set free.[5]

Significantly, the impact of the Ninth Circuit's ruling goes far beyond these 331 prisoners. There are numerous other statutes in California where, like Penal Code section 666, the first violation is a misdemeanor, and any subsequent violation may be prosecuted as a felony.[6] The Ninth Circuit's ruling

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5. A recent study by the San Jose Mercury News found that 95% of the cases in which a 25-years-to-life sentence was imposed in Santa Clara County for a non-violent offense under the Three Strikes law, the prisoners "had previously committed multiple violent acts," and "[t]heir rap sheets contain scores of robberies, rapes, sexual molestations, serial burglaries, assaults and other hard-core criminal behavior." Connie Skipitares, *3 Strikes Sentencing Law Appears To Have Met Its Goal*, San Jose Mercury News, Dec. 28, 2001, at 1A, 18A.

6. *See, e.g.*, Cal. Penal Code § 647.6(c)(1) (annoying or molesting a child); Cal. Penal Code § 12025(b)(1) (carrying a weapon concealed within a vehicle or on a person); Cal. Penal Code § 314 (lewd or obscene conduct); Cal. Penal Code § 289.6(i) (public entity employees engaged in sexual activity with a confined consenting adult); Cal. Penal Code § 311.2(c) (sending or bringing into the state for sale, etc., matter depicting sexual conduct with a minor); Cal. Penal Code § 311.3(d)

directly threatens the constitutionality of three-strikes sentences imposed for the violation of one of these statutes. In fact, in the few weeks since *Brown* was decided, one court has concluded that the sentence of a three-striker whose offense of conviction was felony vehicle theft, a "wobbler," is unconstitutional under compulsion of *Brown*, *Critton v. Hall*, CIV. No. S-99-2491 FCD GGH P (E. D. Cal. Feb. 14, 2002), and another has questioned whether *Brown* mandates granting habeas relief to a defendant convicted of a nonviolent, straight felony, notwithstanding the defendant's extensive and violent criminal history. *Duran v. Castro*, CIV. No. S-00-305 LKK/JFM (E.D. Cal. Feb. 22, 2002) (expressing "some concerns" whether magistrate was right in recommending against granting habeas relief where the defendant was sentenced to 25 years to life for felony possession of heroin, not a wobbler [Cal. Health & Safety Code § 11350(a)], and had an extensive and violent criminal history that includes kidnapping a woman and a child under the age of 14; a robbery in which he stabbed his female victim several times; escaping from jail; being a convicted felon in possession of a firearm; numerous burglaries and receiving stolen property; and forgery.)[7]

(sexual exploitation of a child); Cal. Penal Code §§ 311.4, 311.9(b) (employment of a minor to perform sexual acts); Cal. Penal Code § 311.11(b) (possession or control of matter depicting a minor engaging in sexual conduct); Cal. Penal Code §§ 313.1, 313.4 (distribution or exhibition to minors); Cal. Penal Code § 502.8(c) (advertising, using, or possessing telecommunication devices with the intent to avoid payment); Cal. Penal Code § 12031(a)(2)(A) (carrying a loaded firearm); Cal. Vehicle Code § 23550(a) (driving under the influence); Cal. Penal Code § 594.7 (subsequent conviction for vandalism); Cal. Penal Code § 12304 (sale/possession of fixed ammunition).

7. Professor Erwin Chemerinsky, counsel for respondents both in *Andrade* and this case, has predicted "a

II.

THE NINTH CIRCUIT'S INTERPRETATION OF THE TERM "CONTRARY TO" IN SECTION 2254(d)(1) THWARTS CONGRESS' INTENT TO GIVE DEFERENCE TO STATE COURT ADJUDICATIONS, CONFLICTS WITH THE LANGUAGE OF THE STATUTE AND THE DECISIONS OF OTHER FEDERAL CIRCUITS, AND VIOLATES ESTABLISHED PRINCIPLES OF COMITY.

Section 2254(d)(1) of title 28 defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." This Court has accorded both the "contrary to" and "unreasonable

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flood of new legal challenges," and that "what you'll see by the defense bar is lawyers arguing that other nonviolent crimes used for a life sentence is unconstitutional." David Kravets, *California Court Weakens 3-Strikes Law*, AP Online, Feb. 8, 2002; see also Greg Winter, *California Appellate Ruling Aids Foes of 3-Strike Law*, The New York Times, Dec. 10, 2001, at A14 (57% of the 7,000 felons serving life sentences under California's Three Strikes law were imprisoned for non-violent offenses; public defenders across the state are digging-up old cases to mount a broad challenge to the three-strikes law).

application" clauses independent meaning. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

A state court's decision can be "contrary to" Supreme Court authority either if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts "materially indistinguishable" from those in a controlling case, but nonetheless reaches a different result. *Williams*, 529 U.S. at 405-06. A state court's decision can involve an "unreasonable application" of Supreme Court precedent if it either correctly identifies the governing legal rule but then applies it to a new set of facts in a way that is objectively unreasonable, or extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Williams*, 529 U.S. at 410-14. This Court in *Williams* clarified that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" in 28 U.S.C § 2254(d)(1) refers to holdings, as opposed to dicta, of Supreme Court decisions as of the time of the relevant state-court decision. *Williams*, 529 U.S. at 412.

In response to Brown's constitutional challenge to his sentence, the California Court of Appeal, after reviewing his lengthy criminal history and crimes of violence, stated: "[D]efendant is a chronic thief and assailant whose behavior is an easy and appropriate fit within the habitual offender law. . . [¶] With respect to the federal Constitution, we simply note if a sentence of life without possibility of parole for a single offense of possessing more than 650 grams of cocaine is not disproportionate under the United States Constitution (see *Harmelin v. Michigan* (1991) 501 U.S. 957, 1009 [115 L.Ed.2d 836, 874]), a fortiori a term of 25 years to life for a person with defendant's record cannot be considered disproportional." (App. G.)

The Ninth Circuit ruled that *Brown* is "properly characterized as [a] 'contrary to' case[] because the state court decision[] [ ] failed to apply some or all of the required Supreme Court analysis" as enunciated in *Rummel*, *Solem*, and *Harmelin*.

Brown, ___ F.3d at ___, 2002 WL 187415, *5; *see also id.* at ___, 2002 WL 187415, *17 ("Brown's habeas petition . . . is properly resolved under the 'contrary to' clause of AEDPA."). By this reasoning, a state court adjudication will be denied AEDPA deference unless the state court *explicitly* discusses every factor relevant to deciding the federal constitutional issue; the citation to and discussion of the leading United States Supreme Court decision -- in this case *Harmelin* -- is insufficient.[8/]

The Ninth Circuit's ruling conflicts with the language of § 2254(d)(1). "Nothing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process. Nowhere does the statute make reference to the state's process of reasoning." *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001).

The ruling also conflicts with the decisions of the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and

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8. The Ninth Circuit has concluded that when analyzing a habeas claim under the AEDPA standard of review, a federal court must first decide whether the state court's decision was erroneous, prior to considering whether such decision, even if erroneous, involved an unreasonable application of federal law. *Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir. 2000). This approach was expressly rejected by the Fourth Circuit in *Bell v. Jarvis*, 236 F.3d 149, 161 (4th Cir. 2000) (en banc), *cert. denied*, *Bell v. Beck*, ___ U.S. ___, 121 S. Ct. 74, 151 L. Ed.2d 39 (2001), and is inconsistent with the approach taken by this Court in *Penry v. Johnson*, 532 U.S. 782, ___, 121 S. Ct. 1910, 1919, 150 L. Ed.2d 9 (2001) ("We need not and do not decide whether these differences affect the merits of Perry's Fifth Amendment claim. Rather, the question is whether the Texas court's decision was contrary to or an unreasonable application of our precedents.")

Eleventh Circuit Courts of Appeals[9/] who have held that state-court adjudications are entitled to deference under 28 U.S.C. § 2254(d)(1) regardless of whether the state court explains its reasoning process. As Judge Posner recognized in *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997), to condition "reasonableness" or "unreasonableness" on the quality of a state court's reasoning, rather than its results "would place the federal court in just the kind of tutelary relation to the state courts that the recent amendments are designed to end." And as the Fifth Circuit explained, "[i]t would be odd to require a less deferential approach to reasonableness in cases where the state courts attempted to articulate reasons for their decisions than in those where they did not." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001).

By equating silence with refusal, the Ninth Circuit also violated the principles established by this Court that state courts are presumed to follow the law even when they fail to so indicate, *Walton v. Arizona*, 497 U.S. 639, 653 (1990), and that federal habeas courts should "not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim." *Coleman v. Thompson*, 501 U.S. 722, 739 (1991); *see also Weeks v. Angelone*, 528 U.S. 225 (2000) (applying § 2254(d) review

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9. *See, e.g., DiBenedetto v. Hall*, 272 F.3d 1, 6 (1st Cir. 2001); *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000) (en banc), *cert. denied*, *Bell v. Beck*, ___ U.S. ___, 121 S. Ct. 74, 151 L. Ed.2d 39 (2001); *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997); *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999); *Wright v. Secretary for Dept. of Corrections*, 278 F.3d 1245, 1254 (11th Cir. 2002).

standards in the face of a summary denial by the Virginia Supreme Court.)

The California Court of Appeal did not apply an incorrect legal standard, nor did it reach a result different than a Supreme Court case involving "materially indistinguishable" facts. *Williams*, 529 U.S. at 405-406. Indeed, the California Court of Appeal specifically cited to and discussed *Harmelin*, this Court's most recent pronouncement on cruel and unusual punishment. The absence of an explicit discussion of every Eighth Amendment principle does not render the adjudication "contrary to" Supreme Court precedent.

III.

SUPREME COURT REVIEW IS NEEDED REGARDLESS OF WHETHER THIS COURT GRANTS THE PETITION FOR CERTIORARI IN *ANDRADE v. ATTORNEY GENERAL*

The State previously filed a petition for writ of certiorari seeking review of the Ninth Circuit's decision in *Andrade v. Attorney General*, 270 F.3d 743 (9th Cir. 2001). That case is scheduled to go to conference on March 29, 2002.

Supreme Court review is needed in this case regardless of whether the Court grants the petition for certiorari in *Andrade*. Although the decision in this case subsumes the issues presented in *Andrade* -- the constitutionality of a sentence imposed under the Three Strikes law for an offense of petty theft with a prior -- its expansion of *Andrade's* holding to the present facts provides additional grounds and further justification for Supreme Court review. Andrade's prior convictions were for non-violent offenses. Both Brown and Bray, however, have extensive criminal histories that include numerous crimes of violence. The nature of these prior convictions may be relevant to the ultimate resolution of the Eighth Amendment question. *Solem*, 463 U.S. at 296 n.21 (prior offense relevant to Eighth Amendment question); *id.* at 292-93 ("non-violent crimes are less serious than crimes marked by violence or the threat of violence."). Also, Andrade received a "sentence of 50 years to life" for his two current convictions for petty theft, considerably longer than Brown's and Bray's 25-years-to-life sentences. The "harshness of the penalty" is a relevant factor to consider in deciding the constitutionality of a sentence. *Solem*, 463 U.S. at 292.

In addition, this case presents an issue of fundamental legal significance not presented in *Andrade*: namely, whether a state court adjudication is "contrary to" Supreme Court

precedent when it cites to and discusses controlling United States Supreme Court authority, but does not explicitly discuss every factor stated in the controlling precedent.

CONCLUSION

For the stated reasons, the petition for a writ of certiorari should be granted.

Dated: March 22, 2002

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

D. A. MAYLE, Warden, *Petitioner,*
v.
RICHARD N. BROWN, *Respondent,*

EDDIE YLST, Warden, *Petitioner,*
v.
ERNEST BRAY, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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VIII Amend.; 28 U.S.C. § 2254; CA Penal Code §§ 666, 667, and 1170.12 O

United States Court of Appeals,
Ninth Circuit.

Richard Napoleon BROWN, Petitioner-Appellant,
v.
D.A. MAYLE; Attorney General of the State of California,
Respondents-Appellees.

Earnest BRAY, Jr., Petitioner-Appellant,
v.
Eddie YLST, interim Warden; Attorney General of the State of California; Daniel
E. Lundgren, Respondents-Appellees.

Nos. 99-17261, 99-56197.

Argued and Submitted Dec. 12, 2001.
Filed Feb. 7, 2002.

Appeal from the United States District Court for the Eastern District of California William B. Shubb, District Judge, Presiding.

Appeal from the United States District Court for the Central District of California Manuel L. Real, Chief Judge, Presiding.

Erwin Chemerinsky, Los Angeles, CA, for the appellants.

Brian R. Means and Stephanie A. Miyoshi, State of California Department of Justice, for the appellees.

Before: STEPHEN REINHARDT, A. WALLACE TASHIMA and MARSHA S. BERZON, Circuit Judges.

OPINION

BERZON, Circuit Judge.

Earnest Bray, Jr. and Richard Napoleon Brown were each convicted of petty theft, Bray for attempting to steal three videotapes and Brown for attempting to steal a steering wheel alarm. Because of prior convictions, each was sentenced to life without possibility of parole for 25 years. Each now appeals the denial of a habeas petition contending that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment.

This court recently held, in *Andrade v. Attorney General of the State of California,* 270 F.3d 743 (9th Cir.2001), that a 50-year-to life sentence for two petty theft convictions violated the Eighth Amendment's prohibition against cruel and unusual punishment, and that the California Court of Appeal unreasonably applied clearly established United States Supreme Court law when it held otherwise. *Id.* at 747. Because these cases are indistinguishable from *Andrade* in any material respect, we similarly hold that the California Court of Appeal decisions upholding 25-year-to-life sentences for petty theft were contrary to and unreasonable applications of clearly established Supreme Court law. Like *Andrade,* "[o]ur decision does not invalidate California's Three Strikes law generally." *Id.*

I. BACKGROUND

A. Provisions of The California Three Strikes Law

As *Andrade* summarizes in detail the pertinent background and features of California's so-called three strikes law ("Three Strikes"), Cal.Penal Code §§ 667(b)-(i) and 1170.12, we do so only briefly here. *See* 270 F.3d at 747-48. Unless otherwise stated, all statutory citations are to the California Penal Code.

A defendant with two or more prior "strikes"--that is, certain felony convictions--who is convicted of a felony must be sentenced under the Three Strikes statute to no less than 25 years to life, § 667(e)(2)(A), and cannot receive "good time credits" to reduce his sentence below the mandatory minimum term of 25 years. *In re Cervera,* 24 Cal.4th 1073, 103 Cal.Rptr.2d 762, 16 P.3d 176, 181 (Cal.2001). Only "serious" felonies, *see* § 1192.7(c), or "violent" felonies, *see* § 667.5(c), count as prior strikes. § 667(d)(1). The current offense that triggers the Three Strikes penalties, however, may be *any* felony under California law. § 667(e)(2)(A). It is this latter feature that led to life sentences for minor thefts in *Andrade* and in these cases.

Petty theft--theft of goods or money worth less than $400, §§ 487, 488--is a misdemeanor, carrying a maximum sentence of 6 months in jail, § 490. Petty theft "with a prior"--that is, when committed after a conviction and time served for petty theft, grand theft, auto theft, burglary, carjacking, robbery, or receiving or concealing stolen property--is punishable either as a misdemeanor with up to one year in county jail or as a felony with up to three years in state prison. §§ 666, 496, 18.

A conviction of petty theft with a prior as a felony can count as the triggering offense for purposes of Three Strikes, *People v. Terry,* 47 Cal.App.4th 329, 54 Cal.Rptr.2d 769, 770-71 (Ct.App.1996), leading to two unusual features of California recidivism law. First, the "core conduct" of petty theft with a prior "is, in the first instance, classified as a misdemeanor rather than a felony." *Andrade,* 270 F.3d at 760. Where petty theft with a prior results in a felony conviction, the petty theft offender's recidivism can be "double counted," so as initially to transform the misdemeanor of petty theft into a felony and then to count it as the basis for a life sentence. *Id.* at 759-60; *see also Riggs v. California,* 525 U.S. 1114, 119 S.Ct. 890, 142 L.Ed.2d 789 (1999) (Stevens, J., memorandum opinion respecting the denial of the petition for writ of certiorari).

Second, if petty theft is committed after multiple prior convictions for

non-theft offenses, including serious and violent offenses, then the petty theft must be charged as a misdemeanor and cannot trigger Three Strikes' enhancements. *See* § 666. So, for example, if Bray's or Brown's prior convictions had all been for assault or manslaughter, neither could have been sentenced to 25 years to life for his petty theft conviction; only a six-month misdemeanor sentence would have been possible. *See* § 490, 666.

B. Facts and Procedural History

1. *Bray v. Ylst*

a. *Bray's Principal Offense*

On March 28, 1994, Bray attempted to steal three videotapes from a music and video store in a Long Beach, California shopping mall. He activated the store's alarm system when he tried to leave, and the store's clerks detained him and turned him over to mall security. When the police arrived and arrested Bray, they confiscated a plastic bag containing the videotapes.

b. *Bray's Prior Convictions*

In finding Bray guilty for the theft of the videotapes, the jury also found that he had been convicted of four previous felony offenses. [FN1] In February 1980, Bray was convicted on three separate counts of robbery, § 211. The first two convictions stemmed from one August 1979 incident in which Bray and a co-defendant stole a purse and a briefcase from the driver of a car. When the victim grabbed Bray, his co-defendant, who was brandishing a gun, pointed it at the driver's head and threatened to kill her if she did not release Bray. The victim complied, but as Bray and the co-defendant fled the scene, the co-defendant fired three shots.

The third robbery conviction stemmed from a separate incident in which Bray and several co-defendants approached the victim and demanded his

watch. One co- defendant then hit the victim in the face and took the watch. After the victim fell to the ground, a second co-defendant kicked him in the face and took five dollars in cash. The court sentenced Bray to three years in prison for each of the three convictions, the sentences to run concurrently. After 21 months, he was released on a work furlough.

The jury also found that in November 1987, Bray was again convicted of robbery. The court sentenced Bray to three years in prison, but he was paroled approximately 18 months later.

c. *Prior Proceedings*

Based on the presence of a prior theft conviction, Bray's current petty theft offense was charged as a felony, § 666. The jury convicted Bray of the felony and returned "true" findings on the allegations that Bray had four prior serious or violent felony convictions and had served two prior prison terms. Because he was convicted for the current offense as a felony and the jury found two or more prior strikes, Bray was subject to the mandatory 25-year-to-life sentence provided by Three Strikes. At sentencing, the court rejected Bray's argument that his punishment was cruel and unusual in violation of the Eighth Amendment. Bray appealed his sentence on the same grounds, but the California Court of Appeal rejected this contention in an unpublished opinion, and the California Supreme Court denied Bray's petition for review.

Bray then filed a 28 U.S.C. § 2254 habeas petition in district court. The magistrate judge issued a report concluding that Bray's sentence did not violate the prohibition against cruel and unusual punishment. Adopting the magistrate judge's reasoning, the district court denied Bray's habeas petition. Although the district court denied Bray's application for a Certificate of Appealability (COA), this court granted a COA on the cruel and unusual punishment issue. [FN2]

2. *Brown v. Mayle*

a. *Brown's Principal Offense*

On August 7, 1995, Brown attempted to shoplift a steering wheel alarm worth $25 from a Walgreens store. He picked up a few items in the store and left them on the counter, telling the clerk that he needed to go get his checkbook. He returned several hours later and brought a few more items to the counter. When the clerk asked if he had found his checkbook, he replied that he had. After questioning why the clerk kept watching him, he put the items down and stated that he did not want to buy anything from the store. When Brown tried to leave again, he set off the store's alarm system. The clerk detained Brown and asked him to return what he had taken. He evidently refused. When security guards arrived, they found on Brown the steering wheel alarm with a security tag. [FN3]

b. *Brown's Prior Convictions*

Although Brown's criminal history is somewhat longer than Bray's and includes numerous convictions for misdemeanor offenses, Brown has a total of five serious or violent prior felony convictions: [FN4] A 1971 conviction for two counts of second degree burglary, § 459; a 1976 conviction for two counts of assault with a deadly weapon, § 245; and a 1984 robbery conviction, [FN5] § 211. The record does not reveal the underlying facts of these offenses.

c. *Prior Proceedings*

The jury found Brown guilty of petty theft with a prior, § 666. Brown had waived the right to have a jury determine whether his prior convictions were true, and the court found that he had been convicted of two prior strikes-the 1976 assault and the 1984 robbery. At sentencing, Brown moved to have the court strike the prior convictions on the grounds that a 25-year-to-life sentence would constitute cruel and unusual punishment. The court rejected the motion and sentenced Brown under Three Strikes to 25 years to life.

Brown appealed his sentence, arguing that the term imposed was

disproportionate to his offense and therefore in violation of the federal and state constitutional prohibitions against cruel and unusual punishment. The California Court of Appeal issued an unpublished opinion affirming Brown's sentence, and the California Supreme Court denied his petition for review without opinion. Brown filed a habeas petition in the California Court of Appeal and later in the California Supreme Court, but both courts issued bare denials of the petitions.

Brown then petitioned for habeas relief in the federal district court, raising four claims: (1) the Three Strikes law is unevenly applied; (2) he should be resentenced pursuant to the California Supreme Court decision of *People v. Superior Court (Romero),* 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628 (Cal.1996) (allowing judges to "strike" a defendant's prior strikes for purposes of applying Three Strikes, if it would be "in furtherance of justice"), decided after he was sentenced; (3) 25 years to life for petty theft constitutes cruel and unusual punishment; and (4) his prior convictions should be stricken because they occurred before Three Strikes was enacted.

The magistrate judge's report construed the uneven application argument as an equal protection claim and the request to strike the prior convictions because of their timing as an ex post facto claim, and recommended rejecting both contentions on the merits. The report also recommended that the Eighth Amendment claim be rejected on the merits and that the request to be resentenced be denied, because such relief must be pursued in state court. The district court adopted these recommendations in full and denied the habeas petition. After obtaining a COA for all four issues from the district court, Brown raised each of them in his original *pro se* habeas petition to this court.

3. *Prior Proceedings in This Court*

Bray and Brown initially filed *pro se* petitions in this court. After *Andrade* was decided, we consolidated the cases, appointed counsel, and ordered supplemental briefing and argument regarding the impact of *Andrade* on the constitutionality of Bray's and Brown's sentences.

II. DISCUSSION

We review *de novo* a district court's denial of a 28 U.S.C. § 2254 petition. *Bribiesca v. Galaza,* 215 F.3d 1015, 1018 (9th Cir .2000) Because Bray and Brown filed their federal habeas petitions after April 24, 1996, the amendments to 28 U.S.C. § 2254 under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply. *Van Tran v Lindsey,* 212 F.3d 1143, 1148 (9th Cir.2000).

Under AEDPA, a federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or were "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts. 28 U.S.C. § 2254(d). A state court decision is "contrary to" clearly established federal law if it "failed to apply the correct controlling authority from the Supreme Court." *Shackleford v. Hubbard,* 234 F.3d 1072, 1077 (9th Cir.2000); *see also Williams v. Taylor,* 529 U.S. 362, 405-07, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Packer v. Hill,* 277 F.3d 1092, 2002 WL 47063 (9th Cir. Jan.15, 2002). In order to merit habeas relief under the "contrary to" clause of AEDPA, however, a petitioner must show not only that the state court failed to apply clearly established Supreme Court law but also that it reached an *erroneous* decision that warrants issuance of the writ under the standard in *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (requiring that the error have had a substantial or injurious effect on the verdict). *See Packer,* 277 F.3d 1092, 2002 WL 47063 at *7.

The requirements for relief are somewhat higher where the state court applied the clearly established federal law but erred in doing so: A state court's decision applying clearly established federal law is "unreasonable" under AEDPA only when we are left "with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous--in other words that clear error occurred."

Van Tran, 212 F.3d at 1153-54. The *Brecht* standard must be met as well in "unreasonable application" cases. *See Packer,* 277 F.3d 1092, 2002 WL 47063, at *7.

As we develop below, (*see* Part C, *infra*), Bray and Brown are properly characterized as "contrary to" cases because the state court decisions in both cases failed to apply some or all of the required Supreme Court analysis as enunciated in *Rummel v. Estelle,* 415 U.S. 263 (1980), *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). In *Andrade,* however, we held that the petitioner was entitled to relief because the state court decision involved an "unreasonable application" of *Rummel, Solem,* and *Harmelin.* 270 F.3d at 766-67. Because the substantive issues in *Bray* and *Brown* are so similar to those we recently resolved in *Andrade,* and because applying *Andrade*'s analysis here leads to the conclusion that the state court decisions in *Bray* and *Brown* were clearly erroneous, we will analyze the issues here under the more stringent "unreasonable application" standard. As petitioners meet the higher threshold of "clear error" that is required to show an "unreasonable application" of Supreme Court law, *a fortiori* they meet the lower requirement of "error" that applies in a "contrary to" law case.

A. The Andrade Opinion

In *Andrade,* this court held that the California Court of Appeal unreasonably applied clearly established Supreme Court law when it held that a sentence of life without possibility of parole for 50 years for two petty theft convictions did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. 270 F.3d at 747.

Andrade was convicted of two separate counts of petty theft for shoplifting a total of nine videotapes valued at $153.54 from two different K-mart stores, on occasions two weeks apart. Because he had a prior theft conviction, Andrade was charged with a felony for each of the two petty theft counts. The offenses were tried together (although

they need not have been). The resulting petty theft convictions were counted as Andrade's third and fourth strikes under Three Strikes, as Andrade had at least two prior serious felony convictions-- specifically, three prior residential burglary convictions. Three Strikes mandated a sentence of 25 years to life, with no eligibility for parole for at least 25 years, for each petty theft conviction. The judge ordered, pursuant to a Three Strikes provision, § 667(e)(2)(B), that the sentences run consecutively, so Andrade would not be eligible for parole for at least 50 years. 270 F.3d at 746.

After reviewing the relevant Supreme Court law on the Eighth Amendment, *Andrade* concluded that "three objective criteria ... guide proportionality analysis under the Eighth Amendment: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 756 (quoting *Solem,* 463 U.S. at 292). Nevertheless, this court recognized that under "the rule of *Harmelin* " articulated in Justice Kennedy's controlling opinion in that case, the "Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 754 (quoting *Harmelin,* 501 U.S. at 1001 (Kennedy, J., concurring)). A court, therefore, need not consider the second and third prongs of *Solem* 's test if the first factor--a comparison of the punishment to the offense--does not raise an inference of gross disproportionality. *Id.* at 758.

Comparing the sentence in the case before it to those in the most closely analogous Supreme Court Eighth Amendment cases, *Andrade* found that the penalties in that case--two consecutive life sentences, each without possibility of parole for 25 years--were much harsher penalties than the sentence in *Rummel,* because Rummel would have been eligible for parole in 12 years or less. *Id.* at 264. [FN6] The court analogized the penalty instead to the sentence of life without possibility of parole in *Solem.* [FN7] Because Andrade would not be eligible for parole until age 87, ten years beyond the life expectancy of a 37 year old male, the court

referred to his sentence as "the functional equivalent of ... life in prison without possibility of parole." *Id.* at 759.

Recognizing that harsher punishments for recidivists are justified, *Andrade* stressed that "the enhanced punishment imposed for the [present] offense is not to be viewed as ... [an] additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Id.* (quoting *Witte v. United States,* 515 U.S. 389, 400, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995)). Focusing on the "latest crime," *Andrade* concluded that shoplifting nine videotapes was comparable to the offense in *Solem* of uttering a no-account check. *Id. Andrade* also noted that the core conduct of petty theft is not conduct traditionally punishable as a felony but as a misdemeanor, punishable by a fine or a jail sentence of six months or less. *Id.* Since "the core conduct for which Andrade was sentenced is, in the first instance, classified as a misdemeanor rather than a felony," 270 F.3d at 760, using petty theft with a prior theft conviction, ordinarily punishable by up to three years in prison, §§ 666, 18, to serve as the "third strike" creates a "unique quirk," allowing a defendant's recidivism to be "double counted." *Andrade,* 270 F.3d at 759-60. Further, noted *Andrade,* deference to legislative judgments concerning the appropriate "extreme sentences" is less pronounced when the offense is not classified as a felony. *Id.* at 760; *see also Riggs,* 525 U.S. at 1114 (Stevens, J., memorandum opinion respecting the denial of the petition for writ of certiorari).

Andrade concluded that the threshold comparison of the harshness of the penalty to the gravity of the crimes led to an inference of gross disproportionality and that Andrade's criminal record did not "dissipate" that determination. 270 F.3d at 761.

In light of its conclusion that the first *Solem* factor raised an inference of gross disproportionality, *Andrade* proceeded to the second factor--whether the sentence is excessive in comparison to sentences imposed on other criminals in California. 270 F.3d at 761. *Andrade* again noted that petty theft is ordinarily punished by no more than six

months in jail, or, if committed after a prior theft conviction, by a term of up to three years in prison (if charged as a felony) or up to one year in jail (if charged as a misdemeanor). *See id.; see also* § 666, 18. And violent offenses such as second degree murder, voluntary manslaughter, and sexual assault carry much less serious penalties than Andrade's Three Strikes sentence. 270 F.3d at 761-62.

The State argued in *Andrade,* as it does here, that the indeterminate life sentence was in line with sentences imposed on other recidivist petty theft offenders under Three Strikes. The court in *Andrade* was not persuaded by that argument, stating: "Although we agree that comparisons to other sentences for other recidivists are relevant, the problem with the State's argument is that it attempts to justify the constitutionally-suspect application of a statute by pointing to other applications of the same statute. We find this approach less than convincing." *Id.* at 762. *Andrade* concluded that the intrajurisdictional comparison supported the inference that Andrade's sentence was grossly disproportionate. *Id.*

Applying the final prong of the *Solem* analysis, *Andrade* found only four other jurisdictions where the "triggering offense (petty theft with a prior) could qualify for recidivist sentencing: Rhode Island, West Virginia, Texas, and Louisiana." *Id.* at 763. Looking closely at the law in those jurisdictions, *Andrade* concluded that the Rhode Island recidivism statute applies only to thefts of more than $100; West Virginia does not count non- violent priors; Texas has a liberal parole policy, so the minimum sentence is much less than in California; and, while Louisiana might have, at the time, imposed a comparable sentence to the one Andrade received, there was "a distinct possibility, unlike in California, that a Louisiana court might have invalidated such a sentence as excessive under the state constitution." *Id.* at 763-65. The possibility of a comparable sentence in only one other jurisdiction, held *Andrade,* strengthened rather than undermined the conclusion that the sentence was grossly disproportionate to the crimes. *Id.* at 765.

Having decided that the California Court of Appeal's holding was

erroneous, *Andrade* further concluded that the result was contrary to or an unreasonable application of clearly established United States Supreme Court law, entitling Andrade to relief under 28 U.S.C. § 2254. *Id.* at 766-67. *Andrade* held that "the law governing the application of the Eighth Amendment to non-violent offenders sentenced to life imprisonment was clearly established" and that a proper proportionality analysis requires a comparison to *Rummel, Solem, and Harmelin. Id.* at 766. The California Court of Appeal had questioned the validity of *Solem* after *Harmelin* and focused its analysis exclusively on *Rummel,* concluding that Andrade's sentence was not disproportionate when his crimes and criminal history were compared with that of Rummel. *Id.* at 766. *Andrade* held that "the California Court of Appeal's disregard for *Solem* results in an unreasonable application of clearly established Supreme Court law" and that"[i]ts conclusion that Andrade's sentence does not violate the Eighth Amendment is irreconcilable with the Supreme Court's decision in *Solem* and thus constitutes clear error." *Id.* at 766-67.

B. Application of Andrade to Bray's and Brown' Sentences

Bray's and Brown's cases are very similar to Andrade's in most respects. As in *Andrade,* Bray and Brown were convicted of shoplifting merchandise worth a small amount of money, an offense ordinarily punishable by a maximum of six months in jail, and sentenced to indeterminate life sentences. While the circumstances of these cases vary in several respects from those in *Andrade,* we conclude that none of these distinctions justifies a different result.

1. *Gross Disproportionality*

[1] The State argues that Bray's and Brown's sentences are only half as long as Andrade's, so that *Andrade*'s gross disproportionality analysis has no application here. Andrade, however, was sentenced to 50 years to life for *two* petty theft convictions; his sentence was nothing more than a 25-year-to- life sentence for a petty theft conviction followed by a consecutive, identical sentence for a second petty theft conviction,

imposed for a distinct, albeit similar, offense that occurred at a different time and place. Although Andrade was tried and sentenced at one time for his two offenses, the joint conviction was fortuitous; there could as easily have been separately imposed consecutive sentences. Moreover, Bray's and Brown's sentences are *not* half as long as Andrade's. Although their *minimum* term is half as long as Andrade's *minimum* term, Bray and Brown were sentenced to indeterminate life sentences and *could* serve as long for their single petty theft convictions as Andrade will for two.

It bears noting, in this connection, that the standard we are applying is one of *proportionality*--the relationship of the conviction to the crime. If Andrade's 50-year-to-life sentence for *two* petty theft convictions was grossly disproportionate, it follows that a 25-year-to-life sentence is grossly disproportionate to *one* petty theft conviction. A combined sentence for two entirely separate offenses cannot be grossly disproportionate if each individual sentence is not grossly disproportionate. [FN8]

Andrade was sentenced to life imprisonment, with no possibility of parole for 50 years, at which time he would be 87 years old. Bray and Brown will both be eligible for parole in 25 years, when they will be about 59 and 67 years old, respectively. As to these possible differences in age on release, that factor cannot be determinative. An Eighth Amendment analysis necessarily considers the punishment for the *offense, Solem,* 463 U.S. at 292, taking into account only those personal circumstances that may mitigate one's culpability in committing the crime. *See, e.g., Penry v. Lynaugh,* 492 U.S. 302, 340, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). So, while *Andrade* mentioned the petitioner's age at possible release, the court could not have meant that the same sentence would have been acceptable for a 19-year old, or that a person with a limited life expectancy is constitutionally entitled to a short sentence for the same crime as a co-defendant not so impaired. Rather, the fact that Andrade could well die before serving out his sentence simply underscored the length of the mandatory sentence. Here, Bray and Brown entered prison as relatively young men and will emerge, if at all, as senior citizens (Brown) or close thereto (Bray), again demonstrating

the length of their punishment. *See Sistrunk v. Armenakis,* 271 F.3d 1174, 1183 (9th Cir.2001) (Kozinski, J., dissenting) (stating that the defendant's life was at stake, because "to an adult man, a thirty-year sentence pretty much *is* life").

2. *Intrajurisdictional Comparison*

Nor does the length of Bray's and Brown's sentences change the result of the intrajurisdictional comparison performed in *Andrade.* Bray and Brown could each have been sentenced for up to three years in prison under Section 666 for their single petty theft convictions, in light of their prior records, while Andrade could have been sentenced for up to six years for his two petty thefts. A 25-year minimum sentence bears the same relationship to the usual three-year sentence for Bray's and Brown's crimes as a 50-year minimum does to the usual six-year sentence. *See Andrade,* 270 F.3d at 761.

Further, the violent crimes to which *Andrade* compared the 50-year sentence--second degree murder, voluntary manslaughter, rape, and sexual assault on a minor--all carry sentences considerably less than 25 years to life. *See id.* at 761-62. Moreover, defendants who commit the same crimes as Brown and Bray and whose records include serious or violent crimes but no theft convictions can be punished under California law by no more than six months in jail. *See* § 666. So Bray and Brown were sentenced to higher terms than criminals who commit serious violent crimes, and than criminals who commit the same crime and have a comparable past record of violent or serious crime.

Additionally, *Andrade* must necessarily have based its intrastate comparison on *one* 25-year-to life sentence rather than two; otherwise, the comparison should have been to *two* convictions for violent crimes, which it was not. *See* 270 F.3d at 761-62. Because Bray and Brown received indeterminate life sentences for *one* petty theft conviction although they could not have been so sentenced for many violent crimes, their sentence, if anything, is *more* disproportionate on an intrajurisdictional basis than was Andrade's.

Bray's and Brown's sentences, we recognize, do not have the distinguishing feature of Andrade's sentence, which was twice as long as that of most petty theft offenders sentenced under Three Strikes. But again, Andrade was sentenced for two, entirely distinct offenses. Anyone sentenced under Three Strikes for two petty thefts with priors would have received the same sentence. Any lack of similar sentences, then, must have been because no one else was sentenced for two such petty thefts under Three Strikes, not because others who were sentenced for similar crimes received lesser sentences.

The State nonetheless maintains that because a few hundred other defendants have been sentenced to 25 years to life under Three Strikes with the triggering offense of petty theft, the sentence is not disproportionate. As *Andrade* held, this approach is "less than convincing," because "it attempts to justify the constitutionally-suspect application of a statute by pointing to other applications of the same statute." *Id.* at 762. In other words, that a sentence is imposed frequently, while relevant to proportionality analysis, cannot be the determining factor, as the protections of the Eighth Amendment are not reserved only for aberrant situations. If, for example, the state decided to chop off the hands of everyone convicted of speeding, the likely conclusion that such a sentence is cruel and unusual would not change because the state inflicted it on many people. Thus, while a comparison between a particular defendant's sentence and that imposed on other recidivists may sometimes be informative, as it was in *Andrade,* such comparison is neither necessary nor, if one discovers only that others have been similarly sentenced under the same statute, entitled to much weight.

3. *Interjurisdictional Comparison*

Andrade noted that in only four states can petty theft with a prior qualify for recidivist sentencing. Looking at those four states, we conclude that at the time his offense was committed and at the time he was sentenced, Bray could not have received a life sentence without possibility of parole in any of them. Brown could have received a life sentence without possibility of parole in Louisiana, because he was arrested and sentenced

while a version of the Louisiana law so permitting was in effect. But, Louisiana has since amended its habitual offender law so that such a sentence is not currently available in Louisiana in either Bray's or Brown's case. Thus, if one can divine a contemporary judgment on the matter among the states, it is that the sentences Brown and Bray received are disproportionate to their petty theft offenses.

a. *Rhode Island*

Like Andrade, Bray and Brown were convicted of stealing merchandise worth less than $100, an offense that cannot count as a felony in Rhode Island, even with prior theft convictions. R.I. Gen. Laws § 11-41-20(d); *see also* 270 F.3d at 763. Thus, the additional 25-year penalty for three-time felons, R.I. Gen. Laws § 12-19-21, would not have applied to either Bray or Brown, and the maximum term that Rhode Island could have imposed on them would be one year, *id.* § 11-41-20(d).

b. *Texas*

If two prior theft convictions were counted for each of them, Bray and Brown could have received up to 20 years in prison for a petty theft conviction under Texas' habitual offender law, Tex. Penal Code Ann. §§ 31.03(e)(4)(D), 12.42(a)(2) & (3), 12.33, but they would have been eligible for parole in five years, or even less with good time credits, Tex. Gov't Code Ann. § 508.145(f)--a distinctly less onerous sentence than the mandatory 25-year sentence they will have to serve in California.

c. *West Virginia*

West Virginia allows for a life sentence upon a third felony conviction. W. Va.Code § 61-11-18(c). West Virginia, however, provides by statute that offenders sentenced to life under the recidivist statute are eligible for parole in 15 years. *Id.* § 62-12-13. Even if West Virginia would have allowed a life sentence for Bray or Brown, they would have been eligible for parole ten years earlier there than in California. Further, while *Andrade* concluded that West Virginia does not allow life sentences for

non-violent recidivists, 270 F.3d at 765, West Virginia also precludes life sentences for some recidivists with violent prior felonies. [FN9]

Under West Virginia constitutional proportionality law, the principal offense, not preceding felony convictions, is the central, albeit not exclusive, focus, "since it provides the ultimate nexus to the sentence." *Wanstreet v. Bordenkircher,* 166 W.Va. 523, 276 S.E.2d 205, 212 (W.Va.1981) (holding that a life sentence for check forgery violated the state constitution, even though one of the prior felonies was for arson); *see also State v. Miller,* 184 W.Va. 462, 400 S.E.2d 897, 898 (W.Va.1990) (finding life sentence disproportionate for an assault conviction that involved a firearm, with prior felonies of breaking and entering, forgery, and false pretenses); *State v. Lewis,* 191 W.Va. 635, 447 S.E.2d 570, 575 (W.Va.1994) (holding that a provision of the criminal code requiring a sentence of one year in prison for a third shoplifting offense violated the state constitutional prohibition against cruel and unusual punishment). Using this approach, the West Virginia Supreme Court has, on at least one occasion, held a life sentence in violation of state proportionality standards when the offender had a violent prior offense, stressing the remoteness in time of the violent offense. *State v. Deal,* 178 W.Va. 142, 358 S.E.2d 226, 231 (W.Va.1987) (finding a life sentence disproportionate for possession of a controlled substance where the record revealed a violent prior felony conviction 16 years earlier).

Three of Bray's violent felony convictions occurred 15 years earlier, while the other was eight years before. It is therefore possible that, focusing on the non-violent nature of his petty theft offense and acknowledging that his prior violent felony convictions were dated, Bray's sentence would have been considered excessive in West Virginia. Brown's prior violent felony convictions occurred 13, 19, and 24 years prior to his petty theft offense. His sentence might well have been considered excessivein West Virginia, based on the age of the violent offenses.

d. *Louisiana*

Finally, under Louisiana's habitual offender statute, at the time the last offenses in these cases were committed, Bray could not have received a comparable sentence, although Brown could have received a higher one.

i. *Bray*

Before August 15, 1995, [FN10] the Louisiana habitual offender statute required that both the third or fourth strike triggering life imprisonment *and* two of the prior felonies be "a crime of violence ..., a sex offense, or ... a violation of the Uniformed Controlled Substances Law punishable by imprisonment for ten years or more or any other crime[ ] punishable by imprisonment for twelve years or more." *See* 1995 La. Sess. Law. Serv. 1245 § 1 (West) (amending La.Rev.Stat. Ann. § 15:529.1(A)(1)(b)(ii) & (c)(ii)). Because his current offense, albeit treatable as a felony if two prior thefts were considered, *see* La.Rev.Stat. Ann. § 14:67(B)(3), is not within any of these special categories of felonies, Bray could not have received such a sentence had he committed his offense in Louisiana at the time he committed his petty theft in California.

Rather, the applicable Louisiana law when Bray committed his offense and received his sentence would have allowed him to be sentenced to a maximum of four years for his current offense: That offense could only have been charged as a third felony in Louisiana, because Louisiana considers only offenses tried separately. Bray was convicted of three of his four robberies in one trial, so he had--and has--at most three strikes under Louisiana law. *See Andrade,* 270 F.3d at 764 n. 22, 765 (citing *State v. Butler,* 601 So.2d 649, 650 (La.1992); *State v. Corry,* 610 So.2d 142, 147 (La.Ct.App.1992)). The petty theft offense, with two prior theft offenses, could be treated as a second or third subsequent felony, in which case the maximum sentence for Bray would have been twice the two-year maximum for a first-time offender. La.Rev.Stat. Ann. §§ 14:67(B)(3), 15:529(A)(1)(b)(i); *see also Andrade,* 270 F.3d at 764 n. 22.

Louisiana has recently amended its habitual offender law so that it

currently reads as it did before August of 1995. 2001 La. Sess. Law Serv. 403 (West). For a period of about six years, however, including the time at which his court of appeal decision was issued, Louisiana could have imposed a sentence of life without possibility of parole on Bray. *See* La.Rev.Stat. Ann. §§ 14:67(B)(3), 15:529.1(A)(1)(b)(ii) & (c)(i)-(ii) (West 2000), *amended by* 2001 La. Sess. Law Serv. 403 (West); *see also Andrade,* 270 F.3d at 265 & n. 22. [FN11] As the statute so providing was not in effect when Bray committed his last offense and is not in effect now, however, it is of no relevance to the interjurisdictional comparison.

ii. *Brown*

Brown committed his offense and received his sentence while the harsher, interim version of Louisiana's habitual offender law was in effect. [FN12] He therefore could have received a sentence of life without parole had he committed his petty theft offense in Louisiana on the same date that he committed it in California. Brown's two prior strikes--assault with a deadly weapon and robbery--would have been considered crimes of violence in Louisiana, so Brown would have been subject to a sentence of life without possibility of parole under the Louisiana statutes in effect during this interim period. *See* La.Rev.Stat. Ann. § 15:529.1(A)(1)(b)(ii) & (c)(ii) (West 2000), *amended by* 2001 La. Sess. Law Serv. 403. It appears, however, that, even while this version of the statute was in effect, a life sentence without possibility of parole for petty theft might well have been vulnerable to successful challenge under the Louisiana Constitution, despite Brown's violent priors, given other recent Louisiana proportionality decisions. *See Andrade,* 270 F.3d at 765 (citing *State v. Hayes,* 739 So.2d 301, 303-04 (La.1999) (holding that a life sentence was impermissibly excessive for a defendant convicted of theft of over $1000 who had a prior robbery conviction, considered violent in Louisiana); *State v. Burns,* 723 So.2d 1013 (La.Ct.App.1998)); *see also State v. Neal,* 762 So.2d 281, 286 (La.Ct.App.2000) (finding a mandatory life sentence without possibility of parole under the habitual offender statute to be unconstitutionally excessive where the defendant's current offense was theft of $160 worth

of goods and his priors included two violent offenses--attempted manslaughter and aggravated battery).

Under the recent amendments to Louisiana's habitual offender statute, Brown could not be subject to a mandatory life sentence without possibility of parole, but he could receive a minimum sentence of 20 years for his last offense--a fourth or subsequent felony--had his entire record been proven to the trier of fact. *See* La.Rev.Stat. Ann. § 15:529.1(A)(1)(c)(i). [FN13] This sentence would be less onerous than his Three Strikes sentence in California: The sentence would be five years shorter, and it is possible that Brown would be eligible for parole before he served 20 years. [FN14]

To summarize: Under both the law in effect at the time of his offense and current Louisiana law, Bray would have received a much lower sentence in Louisiana than in California. While Brown could have received a higher sentence in Louisiana originally, he would now receive a lower sentence in Louisiana than in California, and might be eligible for parole. So, there was at most one jurisdiction that conceivably would have imposed a higher sentence on one of these defendants, and that jurisdiction has since concluded--in an era when legislatures are hardly prone to impose light sentences on repeat criminals-- that such a sentence is too high, and would now impose a lower sentence than in California.

Recent rejection of a higher sentence by the only state that perhaps would have allowed it in narrow circumstances signals a considered national legislative judgment based on actual experience that California's sentence is indeed disproportionate to the crime. *See Estelle v. Gamble,* 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) ("[W]e have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society'.") (quoting *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)). "[T]he circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate,"

Harmelin, 501 U.S. at 1000, and the interjurisdictional comparison cannot in any event be the determining factor in an Eighth Amendment analysis. [FN15] Nonetheless, the fact that California is comparatively isolated in its judgment concerning the appropriate punishment for petty theft by a recidivist, even for a recidivist with some violent criminal history, " 'validate[s][the] initial judgment that [the] sentence is grossly disproportionate to [the] crime'." *Andrade,* 270 F.3d at 765 (quoting *Harmelin,* 501 U.S. at 1005).

4. *Significance of Violent Prior Offenses*

The final possible point of distinction between these cases and *Andrade* is that both Bray's and Brown's past criminal record includes crimes classified by California as violent crimes, while Andrade's did not. *See* § 667.5. For several reasons, this distinction cannot serve to justify a different result than in *Andrade.*

First, this asserted difference is somewhat ephemeral. Andrade's prior convictions could be considered objectively violent, while it does not appear that any of Bray's or most of Brown's priors were considered "violent" under California law at the time of conviction.

Andrade classified Andrade's residential burglary prior convictions as non- violent, as they are not in the list of violent offenses, § 667.5, referenced by Three Strikes. Nevertheless, residential burglary carries a strong potential for violence and is treated as a violent crime for other purposes, including under federal law. *See Taylor v. United States,* 495 U.S. 575, 581, 588, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (noting that the legislative history of the Armed Career Criminal Act of 1984 indicates that burglary was included because it is one "of the most violent street crimes," and "because of its inherent potential for harm to persons" and that "Congress apparently thought that all burglaries serious enough to be punishable by imprisonment for more than a year constituted a category of crimes that shared this potential for violence ..."). [FN16]

Conversely, California law did not categorize ordinary robbery as "violent" when Bray and Brown were convicted. Although Three Strikes references a section listing violent offenses that currently includes "any robbery," § 667.5(c)(9), this section was only recently amended to include *all* robberies, Prop. 21 § 15 (approved March 7, 2000). When Bray and Brown were sentenced, section 667.5 included only robberies perpetrated in a dwelling house or inhabited building or trailer where either (1) "it is charged and proved that the defendant personally used a deadly or dangerous weapon," § 667.5(c)(9) (West 1999), *amended by* Prop. 21 § 15 (approved March 7, 2000); or (2) the defendant voluntarily acted in concert with two or more other persons, § 667.5(c)(18) (West 1999), *amended by* Prop. 21 § 15 (approved March 7, 2000); *see also* § 213(a)(1)(A). Crimes of violence, as defined by section 667.5, also included any felony in which the defendant inflicts great bodily injury on any person or in which the defendant uses a firearm. § 667.5(c)(8).

It is unlikely that any of Bray's four robbery convictions would have been classified as violent under section 667.5. The first two convictions took place in a car and the third outside on railroad tracks. Nor did Bray himself use a firearm or inflict great bodily injury on any person. The record does not reveal facts indicating that the fourth robbery conviction would have fallen within section 667.5 at the time of Bray's appeal.

One of Brown's prior strikes--the assault with a deadly weapon, which involved a firearm--would have been classified as violent under this statute. The record does not reveal any facts of Brown's robbery conviction, other than that it was originally a conviction for burglary, so we cannot assume that it would have met the requirements of a violent felony robbery.

Second, the presence of violent prior offenses might well be of great significance were the crime of conviction a violent crime, but cannot be where the crime of conviction is non-violent. Where the crime of conviction is a violent one, a more severe recidivist sentencing scheme for defendants with past convictions for violent crimes would simply reflect a judgment that such individuals cannot curb their violence and

should therefore be imprisoned for at least a lengthy time and for as long as life. But where, as here, the present conviction does *not* demonstrate continued proclivity toward involvement in violent crime, distinguishing between criminals convicted for non-violent offenses on the basis of their *past* violence would run up against compelling Double Jeopardy Clause considerations.

Recidivist sentencing schemes, imposing higher sentences on repeat offenders, have long been held constitutional in the face of Double Jeopardy challenges. As an early case put it, summarizing and quoting from still-earlier decisions, legislators may constitutionally conclude that " 'one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform for which it was designed' 'has evidenced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence.' " *Moore v. Missouri,* 159 U.S. 673, 677, 16 S.Ct. 179, 40 L.Ed. 301 (1895), *quoting Plumbly v. Commonwealth,* 43 Mass. (2 Met.) 413 (1841), and *People v. Stanley,* 47 Cal. 113 (1873); *see also, e.g., Nichols v. United States,* 511 U.S. 738, 747, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994); *Spencer v. Texas,* 385 U.S. 554, 559-60, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); *Gryger v. Burke,* 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1947) ("The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the crime, which is considered to be an aggravated offense because a repetitive one.")

At the same time, "[t]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Ex parte Lange,* 85 U.S. (18 Wall.) 163, 173, 21 L.Ed. 872 (1874); *see also Witte,* 515 U.S. at 395-96. It is for this reason that the Supreme Court has repeatedly stressed, in upholding recidivist sentencing schemes, that the priors can be relevant only as they aggravate the defendant's culpability for the crime of conviction. If that connection between the prior convictions and the present one is lost, then the Double Jeopardy concerns reemerge. *See Riggs,* 525 U.S. at 1114

(Stevens, J., memorandum opinion respecting the denial of the petition for writ of certiorari).

In this connection, one can perceive two possible theories upon which a recidivist statute can maintain the relationship between the current crime and past convictions so as to avoid Double Jeopardy concerns about imposing a new punishment for past offenses: A harsher sentence for a new crime can be warranted either (1) because the defendant's repeated violations of the criminal law reveal his incapability of conforming to society's norms in general, *see Rummel,* 445 U.S. at 276 ("The interest in recidivist statutes is" in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law"); or (2) because the defendant's current offense involves repetition of a *particular offense characteristic,* indicating that the defendant remains prone to that specific kind of antisocial activity-- as for example, when a defendant commits a second theft offense, demonstrating proclivity toward stealing. If neither of these theories serves to justify the sentencing enhancement for the principal offense, then it is hard to escape the conclusion that the enhancement is simply an additional punishment for the previous offenses, in violation of the Double Jeopardy Clause.

Andrade's holding forecloses application of the first theory--that a general lawbreaking tendency can justify Three Strikes' mandatory indeterminate life sentence for petty theft. *See* 270 F.3d at 747. After *Andrade,* for all the reasons already surveyed, an indeterminate life sentence for a defendant convicted of felony petty theft with a prior who has at least two prior *serious* felony convictions, *see* § 1192.7, violates the Eighth Amendment's prohibition against cruel and unusual punishment. [FN17]

If we attempt to distinguish *Andrade* solely on the basis that Bray and Brown have prior felonies that may have been violent, as opposed to serious, then we would be punishing Bray and Brown as non-violent lawbreakers who were violent in the past. This practice could not be

justified under the second, particular criminal proclivity approach. Rather, the sentence would necessarily be "an additional penalty for their earlier [violent] crimes," for which Bray and Brown have already been punished. *See Gryger,* 334 U.S. at 732; *Solem,* 463 U.S. at 297 n. 21; *Riggs,* 525 U.S. at 1114 (Stevens, J, memorandum opinion respecting the denial of the petition for writ of certiorari). Because such additional penalties for past crimes violate the Double Jeopardy Clause, the prior violence in Bray's and Brown's criminal record cannot be a basis for distinction between these cases and Andrade's.

We note, further, that Three Strikes itself does not distinguish between serious and violent prior offenses. Rather, Three Strikes references other sections of the California Penal Code, which exist for other purposes, to define what felonies count as prior strikes. § 667.5(d)(1) (referring to §§ 667.5(c) and 1192.7(c)). Although certain of these offenses can be found in Section 667.5(c) and are labeled as violent, while other strikes appear only in Section 1192.7(c) and are labeled as serious, the category into which prior convictions fit has absolutely no bearing on the application or length of a Three Strikes sentence. In addition, under the petty theft with a prior statute, violent prior felonies are irrelevant to the enhancement of the petty theft into a felony unless they are also theft crimes. These aspects of the California scheme indicate that California is not enhancing sentences because the prior convictions were for violent crimes. Again, (*see* n. 18, *supra*), it makes little sense to defer to a penal judgment that the legislature did not make in determining whether or not a particular sentence is unconstitutionally disproportionate to the crime of conviction.

In sum, these cases are materially indistinguishable from *Andrade.* We therefore conclude that Bray's and Brown's sentences did violate the Eighth Amendment's prohibition against cruel and unusual punishment.

C. Analysis of the California Courts of Appeal Decisions

In order to merit habeas relief, the California Courts of Appeal decisions [FN18] must be either contrary to or involve an unreasonable

application of clearly established Supreme Court law. *Andrade* concluded that the United States Supreme Court law governing the Eighth Amendment's prohibition against cruel and unusual punishment was clearly established at the time of the California Court of Appeal decision in that case, that is on May 13, 1997. *See* 270 F.3d at 766; *see also Riggs,* 525 U.S. at 1114 (Stevens. J., memorandum opinion respecting the denial of the petition for writ of certiorari) (stating that petitioner sentenced to 25 years to life for petty theft could seek federal habeas relief, because he was asking the Supreme Court to "apply a settled rule of Eighth Amendment law"). Bray's court of appeal decision was filed on May 21, 1997. Although the court of appeal issued Brown's decision in 1996, *Andrade* did not rely on any Supreme Court cases issued after 1991. Therefore, under *Andrade,* the relevant Supreme Court cases were clearly established law by the time of the California Courts of Appeal decisions in these cases.

If we focus particularly on the fact that Bray and Brown had violent prior convictions, that conclusion does not change. Several Supreme Court cases decided before the California decisions in these cases stated that using sentencing enhancements as an "additional penalty for the earlier crimes" as opposed to a "stiffened penalty for the latest crime" could violate the Double Jeopardy Clause. *Witte,* 515 U.S. at 400; *see also Solem,* 463 U.S. at 297 n. 21; *Gryger,* 334 U.S. at 732; *Moore,* 159 U.S. at 677; *Ex parte Lange,* 85 U.S. (18 Wall.) at 173. Thus, the principles that we apply in analyzing the California Courts of Appeal decisions have been clearly established by the United States Supreme Court.

1. *California Court of Appeal Opinion in Bray*

[2] Bray explicitly raised the argument that his sentence violated the United States Constitution's prohibition against cruel and unusual punishment. The California Court of Appeal opinion in his case, however, referred exclusively to California law and failed to mention any of the three critical Supreme Court cases. More significantly, the court refused to give any weight to the relatively minor nature of his current

offense. After reviewing Bray's criminal history, the court stated that, "[q]uite clearly, Bray's sentence is the result of his recidivist behavior and it is that behavior that justifies the 25 years to life term." [FN19]

In *Andrade,* we held that upholding an indeterminate life sentence for a petty theft offense which is normally a misdemeanor constituted an unreasonable application of clearly established Supreme Court law governing the prohibition against cruel and unusual punishment. 270 F.3d at 766. Because, as we have shown, Bray's case is materially indistinguishable from *Andrade,* had the state court conducted an analysis under the controlling precedents, it would have been unreasonable for it not to conclude under the *Solem* test that Bray's sentence was grossly disproportionate to his petty theft offense, in violation of the Eighth Amendment. Consequently, the *Bray* court's decision that the statute, as applied, was constitutional is clearly erroneous, and Bray would be entitled to relief under the "unreasonable application" clause of AEDPA had the state court applied the relevant Supreme Court precedent. *Van Tran,* 212 F.3d at 1153-54. [FN20] Having determined that there was clear error sufficient to satisfy the "unreasonable application" clause, we hold that *a fortiori* the state court decision was "erroneous" and merits habeas relief under the "contrary to" clause. *See Packer,* 277 F.3d 1092, 2002 WL 47063, at *7 & n. 12 (holding that, when a state court decision fails to apply controlling Supreme Court precedent, "the fact that the result is erroneous is sufficient, so long as the *Brecht* standard is met"). Therefore, Bray is entitled to habeas relief.

2. *California Court of Appeal Opinion in Brown*

The California Court of Appeal's opinion in *Brown,* like the opinion in *Bray,* focused primarily on state law and concluded that Brown's sentence was not disproportionate to the petty theft offense within the meaning of the California Constitution. Although the *Brown* court did refer to the Supreme Court's decision in *Harmelin,* the court did not apply the controlling Supreme Court test for determining whether a sentence violates the Eighth Amendment. Rather than considering

whether Brown's sentence was grossly disproportionate to the crime of petty theft for which he was convicted, as *Solem* and *Harmelin* require, the *Brown* court compared Brown's sentence to his entire criminal history, noting that, if life without parole for one drug offense in *Harmelin* was not disproportionate, then "*a fortiori* a term of 25 years to life for a person *with [Brown's] record* cannot be considered disproportional." *See People v. Brown,* C023139, at 3 (Cal.Ct.App.1997) (second emphasis added). Because the addition, deletion, or alteration of a factor in a test established by the Supreme Court constitutes a failure to apply controlling Supreme Court law, Brown's habeas petition, like Bray's, is properly resolved under the "contrary to" clause of AEDPA. *See Williams,* 529 U.S. at 405-06; *Packer,* 277 F.3d 1092, 2002 WL 47063, at *6.

In any event, because we hold that Brown's case, like Bray's, is materially indistinguishable from *Andrade,* the *Brown* court's decision that the statute was constitutional as applied was clearly erroneous and would merit habeas relief under the "unreasonable application" clause of AEDPA, had the *Brown* court applied the relevant Supreme Court precedent. *See Andrade,* 270 F.3d at 266 (holding that the state court's disregard for *Harmelin*'s distinguishing of the severity of the defendant's crime in that case from the "relatively minor" nature of the offenses in *Solem* resulted in an unreasonable application of clearly established Supreme Court law). The California Court of Appeal itself characterized Brown's petty theft as a "fairly nonserious offense," so the court's application of *Harmelin* to the facts in *Brown* was objectively unreasonable. *See id.* As we explained in our analysis of the state court decision in *Bray,* the clear error required to satisfy the "unreasonable application" clause of AEDPA *a fortiori* satisfies the lesser requirement of "error" under the "contrary to" clause. *See Packer,* 277 F.3d 1092, 2002 WL 47063, at *7 & n. 12. Therefore, Brown, like Bray, is entitled to habeas relief under 28 U.S.C. § 2254. [FN21]

III. BROWN'S OTHER CLAIMS

A. Uneven Application of the Three Strikes Law

[3] Brown did not make out a prima facie case that the Three Strikes law is unevenly applied in violation of the Equal Protection Clause. Rather, Brown cited only one other case, with facts distinguishable from those in his case. The district court properly found that Brown failed to meet his burden on this claim. *See McQueary v. Blodgett,* 924 F.2d 824, 834-35 (9th Cir.1991). We therefore affirm the denial of the habeas petition on this issue.

B. Resentencing Pursuant to Romero

[4] Brown argued that he should be resentenced in light of the California Supreme Court's decision in *Romero,* 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628, which held that judges have discretion not to count prior qualifying offenses as strikes. The district court correctly concluded that this state law claim is not cognizable on federal habeas review. *See Williams v. Borg,* 139 F.3d at 740. We affirm the denial of habeas relief with respect to this claim.

C. Ex Post Facto

[5] Brown contends that it is unconstitutional to count as strikes offenses committed prior to Three Strikes' enactment. The application of a sentencing enhancement due to a prior conviction does not violate the Ex Post Facto Clause, *United States v. Sorensen,* 914 F.2d 173, 174 (9th Cir.1990), as long as the statute was in effect before the triggering offense was committed, *United States v. Ahumada-Avalos,* 875 F.2d 681, 683-84 (9th Cir.1984). Three Strikes took effect in March of 1994, before Brown committed the principal offense in August of 1995. We therefore affirm the denial of habeas relief for this claim.

IV. CONCLUSION

We conclude that sentences of 25 years to life for Bray's and Brown's petty theft offenses violate the Eighth Amendment's prohibition against cruel and unusual punishment. Our decision does not hold the California Three Strikes Law unconstitutional, only its application to mandate a

25-year-to-life sentence for a petty theft offense such as those in these cases. Bray and Brown's sentences of life imprisonment with no possibility of parole for 25 years are grossly disproportionate to their respective crimes--stealing three videotapes and a steering wheel alarm--even in light of their criminal records. The California Courts of Appeal decisions upholding their sentences were both contrary to and unreasonable applications of clearly established Supreme Court law.

We therefore REVERSE the district courts' orders denying habeas relief on this ground, and we REMAND with instructions to issue writs of habeas corpus if, within 60 days following the issuance of our mandate, California has not resentenced Bray and Brown in light of our opinion. With respect to Brown's other claims, we AFFIRM the district court.

FN1. Bray's criminal record also includes other convictions not considered by the jury--obstructing/resisting a public officer and trespass in 1979, possession of a dangerous weapon in 1985, being under the influence of a controlled substance in 1991, and petty theft with a prior while he was out on bail for the instant offense in 1995.

FN2. Bray's original *pro se* brief to this court challenged his sentence on a second ground--that the Three Strikes law changed the role of judges and prosecutors and thus was not a proper subject of urgency legislation (legislation that takes immediate effect as opposed to waiting until January 1st at least 90 days after enactment) under the California Constitution. The second issue was not alleged in the district court petition and was not covered by the COA, so we do not have jurisdiction to decide it. In any event, this issue rests solely on state law, so it is not cognizable in a federal habeas proceeding. *Williams v. Borg,* 139 F.3d 737, 740 (9th Cir.1998).

FN3. The state asserts without citation in its supplemental brief that Brown physically resisted after the store's security

guard caught him, so that his principal offense involved violence. The crime of which Brown was convicted (petty theft with a prior) does not, however, require any proof of violence. Even if violence of which a defendant was not convicted were relevant under the Eighth Amendment--which we do not believe it is-- nothing in the record, including the information, the probation officer's description of the offense, the California Court of Appeal opinion, and the district court opinion, indicates that resistance or violence was involved in the petty theft offense.

FN4. Brown's other convictions include: (1) a misdemeanor conviction in 1986 for being under the influence of a controlled substance; (2) misdemeanor convictions in 1987 for giving false information to the police, driving with a suspended license, and DUI; (3) a 1989 misdemeanor theft conviction; (4) a felony vehicle theft conviction in 1990; (5) misdemeanor convictions in 1990 for giving false information to the police, burglary, and distribution of hypodermic needles without a license; (6) misdemeanor convictions in 1991 for theft, battery, and petty theft with a prior; (7) misdemeanor convictions in 1992 for second-degree robbery and possession of drug paraphernalia; and (8) a misdemeanor conviction in 1994 for possession of controlled substances without a license.

FN5. Brown was originally convicted of felony burglary, § 459, in 1982, but after the conviction was reversed and remanded, pleaded guilty in 1984 to one count of felony robbery.

FN6. In *Rummel,* the Court upheld a sentence of life imprisonment with possibility of parole for a three-time non-violent felony recidivist. 445 U.S. at 264. Rummel was convicted of obtaining money by false pretenses, a felony ordinarily punishable by two to ten years in prison. Rummel had two prior felony convictions. *Id.*

FN7. In *Solem,* the Court reversed a sentence of life imprisonment without possibility of parole for a seven-time non-violent felony recidivist who was convicted of writing a no-account check. 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637. Helm had six prior felonies, including false pretenses, grand larceny, driving while intoxicated, and three burglary convictions. *Id.* at 279-80. Uttering a no-account check was a felony ordinarily punishable by up to five years in prison, but under the recidivist statute Helm was sentenced to life without possibility of parole. *Id.* at 281. The Court found Helm's sentence "far more severe than the life sentence we considered in *Rummel* " because Rummel could be paroled after 12 years, whereas Helm had no possibility of parole. *Id.* at 297.

FN8. Justice Stevens and the three other justices who joined his reasoning in *Riggs* were very concerned about a 25-year-to-life sentence for petty theft, which they analogized to the offense in *Solem* of writing a bad check. 525 U.S. at 1114 (Stevens, J., memorandum respecting the denial of the petition for certiorari) (noting that the petition "raise[d] a serious question concerning the application of California's'three strikes' law").

FN9. The applicable statutes in West Virginia do not distinguish between violent and non-violent prior felony convictions. *See* W. Va.Code § 61-11-18(c). The West Virginia courts, however, conduct detailed proportionality analysis and, as the cases alluded to in the text indicate, not infrequently hold recidivist sentences invalid after conducting that analysis.

FN10. Bray committed his petty theft on March 28, 1994, and the court sentenced him on April 5, 1995.

FN11. For a third or fourth felony offender whose principal offense was non-violent, the Louisiana habitual offender

statute, between 1995 and 2001, distinguished between violent and non-violent prior offenses, providing harsher penalties for offenders with violent priors. La.Rev.Stat. Ann. § 15:529.1(A)(1)(b)(i)-(ii) & (c)(i)-(ii) (West 2000), *amended by* 2001 La. Sess. Law Serv. 403. Because at least one of his prior offenses was violent, under the Louisiana statutes Bray could have been sentenced to life without possibility of parole. *Id.* § 15:529.1(A)(1)(b)(ii), *amended by* 2001 La. Sess. Law Serv. 403; *see also id.* § 14:2(13)(w),(y), & (z) (defining armed robbery, simple robbery, and purse snatching as crimes of violence).

FN12. Brown committed the petty theft on August 27, 1995, shortly after the amended Louisiana statute went into effect, and the court sentenced him in 1996.

FN13. Unlike Bray's, Brown's prior felony convictions occurred on at least three separate occasions.

FN14. It is not entirely clear whether or not parole would be available under Louisiana Law. Although some provisions of the habitual offender statute require the sentence be "without benefit of parole," the pertinent provision does not mandate parole ineligibility. *Compare* La.Rev.Stat. Ann. § 15:529.1(A)(1)(c)(i)(ii) *with id.* § 15:529.1(A)(1)(C)(i). If the applicable provision of the Louisiana habitual offender statute does not place any restrictions on parole eligibility, then it incorporates the parole restrictions imposed on habitual offenders in the statute covering the crime of conviction. *State v. Tate,* 747 So.2d 519, 520 (La.1999). Brown would have been convicted under the theft statute, La.Rev.Stat. Ann. § 14:67(B)(3), which includes no restrictions on eligibility for parole. Louisiana cases indicate that under these circumstances, an offender convicted under the habitual offender statute may not be *sentenced* to a prison term without benefit of parole. *See State v. Girod,* 703 So.2d 771, 777

(La.Ct.App.1997) (finding that La.Rev.Stat. § 15:529.1(A)(1)(c)(i) "was applicable and it provided for a sentencing range of 20 years to life imprisonment with parole eligibility"); *State v. McCadney,* 761 So.2d 579, 584 & n. 3 (La.Ct.App.2000) (noting that a defendant sentenced to forty years as a fourth-felony habitual offender was not sentenced without benefit of parole).

Louisiana's general parole provision, however, denies parole eligibility to a third or subsequent felony offender, *see id.* § 15:574.1(A)(1). The Louisiana courts have explained that where neither the habitual offender statute provision nor the underlying conviction statute restrict parole, the trial court lacks authority to prohibit parole eligibility pursuant to that statute, even where the defendant is ineligible for parole as a third or fourth felony offender under La.Rev.Stat. § 15:574.4(A)(1). *See St. Amant v. 19th Jud. Dist. Ct.,* 678 So.2d 536 (La.1996) (holding that when the statute of conviction does not restrict parole, the trial court must sentence defendant to a term without a prohibition on parole, because "parole eligibility is to be determined by the Department of Corrections pursuant to La.Rev.Stat. § 15:574.4"); *State v. Larrivere,* 733 So.2d 703, 705 (La.Ct.App.1999) (holding that defendant--a fourth felony offender, and thus ineligible for parole under La.Rev.Stat. § 15:574.4(A)(1)--should have been sentenced without benefit of parole for only the first year of his sentence, as provided by the underlying statute of conviction); *State v. Miller,* 703 So.2d 698 (La.Ct.App.1997) (finding that the trial court should not have prohibited parole for a third-felony offender, because although La.Rev.Stat. § 15:574.4 prohibited his parole, parole eligibility is to be determined by the Department of Public Safety and Corrections, not by the trial court); *State v. Langlois,* 620 So.2d 1193, 1995 (La.Ct.App.1993) (finding that the trial court should not have prohibited parole for a fourth-felony offender).

Thus, a Louisiana court could not have *imposed* the mandatory

20-year sentence without benefit of parole. Precisely how the Department of Corrections, which makes parole eligibility determinations, applies § 15:574.4 is a matter we cannot determine from the case law.

FN15. *See Harmelin,* 501 U.S. at 1004 ("Although *Solem* considered these comparative factors after analyzing the gravity of the offense and the harshness of the penalty, it did not announce a rigid three-part test.") (internal citation and quotation marks omitted); *see also Solem v. Helm,* 463 U.S. at 291 (in determining unconstitutional disproportionality, "no one factor will be dispositive in a given case"); *Robinson v. California,* 370 U.S. 660, 672, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (holding that a 90 day jail sentence for being a drug addict is cruel and unusual punishment, even though at least a few other jurisdictions had similar statutes).

FN16. In Louisiana, burglary can be a violent crime. *See* La.Rev.Stat. Ann. § 14:2(13)(v) (listing aggravated burglary as a violent crime in Louisiana). In West Virginia, burglary may also be considered a violent crime. *State v. Housden,* 184 W.Va. 171, 399 S.E.2d 882, 886 (W.Va.1990) (burglary is a crime that "by [its] very nature involve[s] the threat of harm or violence to innocent persons"); *but see State v. Hedrick,* 182 W.Va. 701, 391 S.E.2d 614, 622 (W.Va.1990) (classifying night-time burglary as a non-violent offense, because "breaking and entering is not per se a crime of violence" and there was "nothing in the record to indicate that weapons were used in these crimes or that there was a threat of violence to any person").

FN17. Andrade had served only one prison term for his three felony convictions, whereas Bray and Brown each served at least two prison terms. This circumstance, however, does not distinguish their cases from *Andrade.* Although repeated separate prison terms may suggest that an individual is not

deterred from additional crimes by serving time in prison, *see Rummel,* 445 U.S. at 277, the California Legislature made no such distinction in Three Strikes. *See* § 667; *see also People v. Benson,* 18 Cal.4th 24, 74 Cal.Rptr.2d 294, 954 P.2d 557, 558 (Cal.1998) (holding that although defendant's two prior felony convictions--residential burglary and assault with intent to commit murder--were sustained in one action and arose out of the same set of facts, they constituted two separate strikes). In analyzing a sentence, we should not defer to distinctions that the State never made in the statute imposing the sentence.

FN18. Because the California Supreme Court denied petitioners' review petitions without comment, the last reasoned decision on this issue in each case is the opinion by the state court of appeal. *Ylst v. Nunnemaker,* 501 U.S. 797, 803-04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).

FN19. The standard applied to determine if a sentence violates the California Constitution is different from a "grossly disproportionate" standard. Under California law, the standard is whether the penalty "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." *In re Lynch,* 8 Cal.3d 410, 105 Cal.Rptr. 217, 503 P.2d 921, 930 (Cal.1972). Although the state court's analysis under California standards is therefore "arguably irrelevant for our purposes," *Andrade,* 270 F.3d at 767 n. 24, it is the only indication we have of the state court's reasoning, so we pay it some attention.

FN20. Because the error affected the length of the sentence, it clearly had a substantial and injurious effect. *See Brecht,* 507 U.S. at 637.

FN21. The *Brecht* standard is met in Brown, as in Bray, for the reason explained in footnote 20, *supra.*

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD N. BROWN,

Petitioner, No. CIV S-99-0241 WBS GGH P

v.

D.A. MAYLE, Warden, **ORDER**

Respondent.

_____/ Filed: Aug. 24, 1999

Petitioner, a state prisoner, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On July 1, 1999, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed July 1, 1999, are adopted in full; and

2. Petitioner's application for a writ of habeas corpus is denied.

DATED: August 24, 1999.

/s/ William B. Shubb
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FILED: Aug. 24, 1999

RICHARD N. BROWN

v.

D.A. MAYLE, WARDEN

P

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
CV S-99-0241 WBS GGH

XX - Decision by the court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 8/24/99.

Jack L. Wagner
Clerk of the Court

ENTERED: August 24, 1999

by: /s/ C. HUTCHISON
Deputy Clerk

FILED
July 1, 1999
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD N. BROWN,

Petitioner, No. CIV S-99-0241 WBS GGH P

vs. FINDINGS AND RECOMMENDATIONS

D.A. MAYLE, Warden,

Respondent.

_____/

I. Introduction

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1996 conviction for petty theft with a prior for which he was sentenced to 25 years to life pursuant to California's Three Strikes Law.[1/] Petitioner was caught stealing

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1. Cal. Penal Code § 667(e) provides:
(e) For purposes of subdivisons (b) to (i), inclusive and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:
(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.
(2)(A) If a defendant has two or more prior felony convictions as defined

a car alarm from a Walgreen's store.

Petitioner raises four grounds for relief: 1) the Three Strikes law is unevenly applied; 2) petitioner should be resentenced pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789 (1996); 3) his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment; 4) his prior convictions should not be counted as strikes because they occurred before the Three Strikes Law was enacted.

After carefully reviewing the record, the court recommends that the petition be denied.

II. AEDPA

The AEDPA applies to this petition for habeas corpus which was filed after the AEDPA became effective. Neelley v. Nagle, 138 F.3d 917 (11th Cir. 1998), citing Lindh v. Murphy, 117 S. Ct. 2059 (1997). The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal

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in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term prescribed in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

In addition, a "three striker" must serve at least 80 percent of his [minimum] sentence. § 667(c)(5). In petitioner's case the minimum term is twenty-five years, and he would first be eligible for parole in twenty years.

defendant's claims of constitutional error. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997). Most important to this case are the changes to 28 U.S.C. § 2254(d) which now read:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

The difficulty is in determining, consistent with Congress' intent, the proper mode of analysis to be applied in evaluating a claim under § 2254(d). In Moore v. Calderon, the Ninth Circuit determined that pure questions of law would be judged by the "contrary to" standard (de novo), and mixed questions of fact and law would be subject to the "unreasonable application of" standard (deference). The Ninth Circuit revisited this issue in Davis v. Kramer, 167 F.3d 494 (9th Cir. 1999). In Davis, the Ninth Circuit essentially rejected the formula set out in Moore v. Calderon, supra, and observed that the terms "contrary to" and "unreasonable application of" "reflect the same general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court. Id. at 500. The court further explained,

> The terms, read together, delineate the range of cases that warrant federal habeas relief under § 2254(d)(1).

> The terms overlap, and cases may fall into one or both classifications, depending on the circumstances. No purpose would be served by attempting to establish a fixed division or to give meaning to one that would exclude the other. Their purpose is the same: to ensure the objective that state courts follow controlling Supreme Court law. [footnote omitted.] For our purposes here, we need state only that a state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.

Id. at 500.[2/]

In Davis, the Ninth Circuit did not describe the standard to be applied in determining whether a state court decision involved an unreasonable application of federal law. However, the Ninth Circuit indicated that if the state court had "failed to apply" the appropriate precedent, no AEDPA deference would be due. Furthermore, if the state court had "misinterpreted" the controlling precedent, no AEDPA deference could be shown by the federal courts, as would be the

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2. In Davis, the Ninth Circuit also indicated that it was not adopting a "pure law vs. mixed question" approach:

> In a footnote in Moore v. Calderon, 108 F.3d 261, 265 n. 3 (9th Cir. 1997), we stated in dicta that the "contrary to" test applies to questions of law, while the "unreasonable application" test applies to mixed questions of law and fact. While this is certainly true in some instances, in the Moore footnote we did not attempt a complete definition of these statutory terms, or set forth an inflexible rule. Nor do we here. We leave the terms with the full flexibility and potential for interchange with which we found them.

Id. at 500 n. 7.

case if the application of precedent was simply "unreasonable." The Davis court itself conducted a de novo review.

However, even more recently, the Ninth Circuit implicitly rejected the "flexible" approach utilized in Davis, and citing Moore v. Calderon unequivocally held "[w]e previously have determined that the standard of 'unreasonable application of [ ] clearly established Federal law' in the new § 2254 governs mixed questions of law and fact, while the standard of 'contrary to . . . clearly established Federal law' applies to pure questions of law." Furman v. Wood, 169 F.3d 1230, 1232 (9th Cir. 1999). Quite apparently, Furman did not view the earlier Moore case's statement as dicta. The court will utilize the Moore/Furman analytical framework.

In applying that framework, the undersigned has applied the standard used by the First, Fifth, Seventh, and Eleventh Circuits, and most recently the Sixth and Fourth Circuits as well. See Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996); Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), revsd. on other grounds, 117 S. Ct. 2059 (1997); O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998), and Neely, supra.[3/] In defining this

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3. Recently, the Sixth Circuit held that it was adopting the Drinkard standard. Nevers v. Killinger, 169 F.3d 352, 361 (6th Cir. 1999):

> Since we heard oral argument in this case this Court, in Herbert v. Billy, 160 F.3d 1131, 1998 WL 801319 (6th Cir. Nov. 20, 1998), has stated its agreement with the "reasonable jurist" approach taken by the Fifth Circuit in Drinkard, 97 F.3d at 769. Today we state as well our agreement with the standard enunciated by the First Circuit, namely, that "for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." O'Brien, 145 F.3d at 25; accord Hall, 106 F.3d at 748-49 ("The statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes."). We recognize that the First Circuit specifically rejected Drinkard's "reasonable jurist" test when articulating its own standard, O'Brien, 145 F.3d at 25 n. 7. We think, however, that the two are not mutually exclusive; rather,

standard, the Fifth Circuit held that "a application of law to facts in unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect." Drinkard, 97 F.3d at 769. The standards applied by the First and Seventh Circuits are similar. See Lindh v. Murphy, 96 F.3d at 870; O'Brien v. DuBois, 145 F.3d at 25.[4/] Because the Ninth Circuit has not directly opined on the standard of review in an "unreasonable application" context, the undersigned maintains his previous analysis based on out-of-circuit authority.

In the instant case, the California Court of Appeal issued a written decision denying petitioner's appeal. Respondent's Exhibit A. The only federal claim specifically addressed by the appellate court was petitioner's Eighth Amendment claim. The California Supreme Court issued a "postcard denial" of the petition for review. Respondent's Exhibit B. The California Court of Appeal and California Supreme Court denied petitioner's habeas corpus petitions with postcard denials as well. Respondent's Exhibits D, E. Because only the Eighth Amendment claim is addressed in a reasoned decision, only the appellate court's decision addressing this claim will be given full AEDPA deference. The Ninth Circuit has had some difficulty in articulating the AEDPA deference

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both standards can be employed to aid in arriving at the correct answer to the question of "unreasonableness." The deference to the state courts' judgments required by the AEDPA is achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be "debatable among reasonable jurists," Drinkard, 97 F.3d at 769, if it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes," O'Brien, 145 F.3d at 25.

The Fourth Circuit in Green, which the Ninth Circuit cites in Davis, adopted the Drinkard standard. See Green, 143 F.3d at 870, 873.

4. See footnote 6 above.

due in a situation where a claim(s) is not addressed in a written, reasoned decision. In an initial opinion, the Ninth Circuit held that no deference was due, and that the federal court should decide the issue de novo. Delgado v. Lewis, 168 F.3d 1148 (9th Cir. 1999). However, that opinion was vacated on rehearing, and the revised rule for claims not addressed in a written decision is that the federal court should "independently" assess the state court decision in light of the AEDPA standard-whether the correct Supreme Court law was applied, and whether the application was unreasonable in light of the clearly established federal law. Delgado v. Lewis, ___ F.3d ___, 1999 WL 415523 * 3 (9th Cir. June 23, 1999). While the court is unsure of what a "dependent" review may entail for claims addressed in a written opinion, other than what has been set forth in the text, the court shall conduct an "independent" review for the unaddressed claims utilizing essentially the same standard as set forth in the text.

III. Discussion

A. Uneven Application of Three Strikes Law

In ground one, petitioner contends that in People v. Bishop, 56 Cal. App. 4th 1245 (1997) the California Court of Appeal for the Second Appellate district upheld the trial court's decision to dismiss two of the defendant's strikes. As a result, the Bishop defendant was not sentenced to 25 years to life pursuant to the Three Strikes Law. The appellate court found that dismissal of the strikes was not an abuse of discretion where the present crime was petty theft and the prior violent offenses which were stricken were remote. The appellate court found that the trial court had discretion to strike the priors pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497, 530-31, 53 Cal. Rptr. 2d 789 (1996), where the California Supreme Court held that trial judges had discretion to strike priors pursuant to Cal. Penal Code § 1385.

Petitioner contends that the facts of his case are "practically identical" to those in Bishop and, on that ground, this court should grant review to resolve the conflict between the second appellate district and the third appellate district, which denied his request to strike his priors.[5]

This court has no authority to resolve a conflict between state appellate courts. However, the court construes these allegations to state an Equal Protection claim. In order to demonstrate that a sentencing statute violates the Equal Protection Clause, a petitioner must state a claim that the statute is unevenly applicable to criminal defendants or is unevenly applied. See McQueary v. Blodgett, 924 F.2d 829, 834-35 (9th Cir. 1991). "Under the prevailing rational-basis test, plaintiffs in appellant's position bear the burden of establishing a prima facie case of uneven application." Id. at 835.

In the instant case, petitioner is contending that the Three Strikes law in unevenly applied. However, other than the case of Bishop, supra, petitioner provides no facts to support this contention. Petitioner cannot state a prima facie case of uneven application based on one other case. In any event, petitioner's case is distinguishable from Bishop.

In Bishop, the defendant had the following convictions:

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5. Petitioner does *not* contend that his trial judge believed that he did not have the discretion to strike prior conviction allegations but that other defendants had trial judges who believed they had the authority to do so. If such an allegation had been made, the equal protection analysis may have been more difficult. However, the California Supreme Court case of People v. Superior Court (Romero), 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789 (1996), which held that trial judges have a limited discretion to strike prior conviction allegations, was expressly retroactive and applied to petitioner's case. Petitioner filed a "Romero remand" habeas corpus petition in which the sentencing court reviewed its record to determine whether striking prior conviction allegation discretion would have been utilized. The trial court in this case found that the record was clear that such discretion would not have been exercised. Respondent's Exhibit C. See also RT 285-296. Thus, petitioner's argument is simply that discretion *should* have been favorably exercised here because it was favorably exercised in allegedly similar cases.

1969-robbery (strike 1).
1979-robbery with use of a firearm and assault (strikes 2 and 3).
1982-battery of a custodial officer.
1987-petty theft with a prior.
1988-petty theft with a prior.
1991-petty theft with a prior.
1993-petty theft with a prior and commercial burglary.

Bishop, 56 Cal. App. 3d at 1248 n. 1, 66 Cal. Rptr. 2d at 348 n. 1.

The defendant in Bishop had stolen six videocassettes from a Thrifty Drug Store. Id. at 1248, 66 Cal. Rptr. 2d at 348. He was 50 years old and his lifetime of crime was directed toward supporting his drug use. Id. In addition to the prior convictions alleged in the case, the Bishop defendant was convicted of other theft offenses and had sustained a federal drug conviction in the mid-1960's for which he had been incarcerated. Id. at 1245 n. 3, 66 Cal. Rptr. 2d 348 n. 3. The opinion of the Court of Appeal in Bishop did not describe these other theft offenses nor indicate how many there were.

In Bishop, the California Court of Appeal observed that in considering whether to strike a prior conviction courts must consider the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as shown by his behavior and demeanor at trial. Bishop, 56 Cal.App.4th 1249, 66 Cal. Rptr.2d at 349.

> To be sure, once a defendant has qualified for three strikes sentencing, the number of his prior convictions operates as a factor in aggravation, as may the nature of his prior and present crimes and the timing with which they were committed. However, the nature and timing of a defendant's crimes may also operate as mitigation, such as in this case where the present offenses are remote. The length of sentence to be

> imposed also presents an open-ended inquiry because, when considered in conjunction with the defendant's age, it presents the trial court with an opportunity to evaluate factors such as how long the state maintains an interest in keeping the defendant as a public charge and after what period of incarceration he is no longer likely to offend again.

Id. at 1250-51, 66 Cal.Rptr.2d at 349-50.

In the instant case, the court has reviewed the probation report (CT 231-235) and the state records ("rap sheet") attached to petitioner's traverse. While petitioner disputes some of the information contained in the probation report, the court finds that petitioner has suffered the following prior convictions:

> 1971-two felony burglary convictions.[6/]
> 1976-two felony counts of assault with a deadly weapon (one case).
> 1984-felony robbery[7/] and misdemeanor being under the influence of a controlled substance.[8/]
> 1986-misdemeanor being under the influence of a controlled substance.
> 1987-misdemeanor giving false information to a peace officer, and misdemeanor driving on a suspended license and driving under the influence.
> 1989-misdemeanor theft.

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6. The rap sheet shows four felony burglary convictions in 1971, although it appears that two of the convictions are listed in duplicative entries.

7. Petitioner was originally convicted of felony burglary and robbery in 1982, but in 1984 the case was remanded and petitioner pled guilty to one court of felony robbery.

8. Petitioner received diversion for this charge in 1984, but in 1986 diversion was terminated and petitioner was sentenced.

> 1990-misdemeanor theft (two convictions); felony vehicle theft; misdemeanor giving false report to a peace officer; misdemeanor burglary, misdemeanor distribution of hypodermic needles without a license.
> 1991-misdemeanor theft, misdemeanor battery, misdemeanor petty theft with a prior.
> 1992-misdemeanor robbery, misdemeanor possession of paraphernalia.
> 1994-misdemeanor possession of certain controlled substances without a valid license.

In addition, as a juvenile petitioner was placed in a camp program for a violation of assault with a deadly weapon. Opinion Court of Appeal, p. 2, Respondent's Exhibit A. The following year he was committed to the Youth Authority for assaulting a camp ward and running from the camp. Id.

In some respects, petitioner's record is similar to the defendant's record in Bishop. His strike priors are equally remote.[9/] He and the Bishop defendant are close in age.[10/] Like the Bishop defendant, petitioner's criminal record suggests a history of drug use.

However, petitioner's criminal history appears longer, more varied and involved more (and more recent) violence than the Bishop defendant. In sentencing petitioner to 25 years to life, the trial court in the instant action made the following comments:

> . . . as the Court has already previously noted, the defendant's criminal history is long and without interruption. There are 17 misdemeanor convictions

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9. The Bishop defendant's strikes were 17 and 20 years old. Petitioner's strikes were based on his 1976 assault with a deadly weapon conviction and his 1984 robbery conviction. Therefore, his strikes were 11 and 19 years old. However, petitioner's 1984 conviction was based on a 1982 conviction that had been reversed. Therefore, his robbery conviction was arguably 13 years old.

10. Petitioner was 43 and the Bishop defendant was 50.

and five or six felony convictions, including this case. Six if you include the 10851 from 1990. There are two violent offenses as a juvenile beginning in 1967 where the defendant did a strong-arm robbery and grand theft auto. It sounds like a car-jacking before its time, committed to CYA. And then there was an assault on camper. That was the beginning of his criminal history.

In 1971, the defendant suffered his first felony, burglary in the second degree. Sent to prison. Concurrent with that was a second felony for second degree burglary. Again sent to prison. It's noted that the arrest charges in that case were 211 PC also.

Third and fourth felonies in 1976, which actually could be the two strikes as I viewed the complaint or the information in this case. It was only charged as one strike. 1976, two counts of 245 PC where the defendant shot at somebody.

In 1984, after remand from the appellate court, the defendant plead guilty to one count of 211. It's noted that that case started off as a multiple count 211, a home invasion-type of case.

The People are quite correct when they point out that there is violence in the recent past relating to the 1991 242 and the 1992 211 as a misdemeanor. There is virtually a continuous lifestyle beginning in 1967 and ending in 1995 where the defendant has been in trouble with the law.

This is not the kind of situation where the defendant's last felony conviction, last conviction of any sort, I should say, was in 1984 and he's lived a totally

> blameless life for that period of time. This is far from that kind of situation. In short, the defendant in no way equates to the defendant in the Dillon case.
>
> . . . there are also other factors which the Court should consider when exercising its discretion under PC 17. First, it is defendant's potential for rehabilitation, and, second, the community's need for protection. As I noted earlier, the circumstances of this offense, while they might seem trivial in terms of the amount, it's clearly a situation from the Court's mind that the defendant was stealing for resale and not for subsistence.
>
> As to the defendant's potential for rehabilitation, certainly his prior track record is indicative of his lack of potential for rehabilitation. Further, the defendant's statement in the POR, the probation officer's report, which the Court previously read regarding the circumstances of the offense, indicate that the defendant lacks remorse and is still blaming others for his problem.
>
> Finally, on the issue of community protection, it's clear that from the defendant's criminal history, the community would be protected from the defendant best by sentencing him to 25 to life. Again, with respect to the PC 17 analysis, the Court wants to make it clear that we're talking about a sentence of 25 to life, not 50 to life.

RT at 294-96.

Petitioner's lengthy and more violent past distinguishes him from the Bishop defendant. Therefore, while petitioner cannot rely on only one other case to establish uneven

application of the Three Strikes law, the Bishop case would not support his Equal Protection claim anyway. Because petitioner has not established a prima facie case for an Equal Protection violation, this claim should be denied.

B. Re-sentencing Pursuant to Romero

In claim two, petitioner requests that he be remanded to superior court for Re-sentencing pursuant to People v. Romero, supra. As stated above, in Romero the California Supreme Court found that trial courts have discretion to strike priors in Three Strikes cases.

This court has no authority to remand petitioner to state court for re-sentencing pursuant to Romero. Petitioner should request, and has requested, the state court for this relief. See footnote 6, supra.

C. Eighth Amendment

Petitioner alleges that his sentence is cruel and unusual in violation of the Eighth Amendment. In United States v. Bland, 961 F.2d 123 (9th Cir. 1992) the Ninth Circuit summarized the standard for considering Eighth Amendment challenges to sentences:

> The Supreme Court most recently addressed the question of proportionality as a component of the eighth amendment in Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). No majority opinion emerged in Harmelin on the question of proportionality. Justice Scalia's two Justice (with Chief Justice Rehnquist) plurality concluded that there was no proportionality review under the eighth amendment except with respect to death sentences. Justice Kennedy's three-Justice concurrence (with Justices O'Connor and Souter)

> concluded that the eighth amendment contains a narrow proportionality principle, which was not confined to death penalty cases. Because neither position received a majority vote, the holding in Harmelin should be viewed as "that position taken by those Members who concurred in the judgments on the narrowest grounds . . ." Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (citation omitted). We conclude that Justice Kennedy's view that the eighth amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime" is the "rule" of Harmelin. Accord United States v. Johnson, 944 F.2d 396, 408-09 (8th Cir.), cert. denied, 502 U.S. 1008, 112 S.Ct. 646, 116 L.Ed.2d 663 (1991); United States v. Hopper, 941 F.2d 419, 422 (6th Cir. 1991).

Bland, 961 F.2d at 128-29.[11]

In Bland, the defendant was sentenced to life without parole following his conviction for felon in possession of a firearm. The Ninth Circuit found that this sentence did not violate the Eighth Amendment:

> The threshold determination in the eighth amendment proportionality analysis is whether Bland's sentence was one of "the rare cases[s] in which a . . . comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Harmelin, 111 S.Ct. at 2707 (Kennedy, J., concurring). In judging the appropriateness of Bland's sentence under a recidivist

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11. But see discussion of proportionality requirement in United States v. Kalena, 152 F.2d 1069 (9th Cir. 1998), opinion withdrawn on grant of reh'g en banc, 161 F.3d 1225 (9th Cir. 1998).

> statute, we may take into account the government's interest not only in punishing the offense of conviction, but also its interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." Rummell v. Estelle, 445 U.S. 263, 276, 100 S.Ct. 1133, 1140, 63 L.Ed.2d 382 (1980). Bland's history of criminal conduct refutes any possibility of disproportionality. He has been convicted of thirteen violent felonies, including assault, rape, kidnaping, burglary, assault with intend to commit rape, forcible lewd act on a child, and forcible copulation.

Bland, 961 F.2d at 129.

In the instant case, petitioner was convicted of petty theft with a prior. However, he has a criminal history that includes six prior felony and sixteen prior misdemeanor convictions.[12/]

Looking only to the crime at issue, reasonable arguments could be made that a sentence of twenty-five years to life for theft of a car alarm is one of those rare circumstances in which the court should engage in a proportionality analysis. However, heeding both Bland's and the Supreme Court's admonition that in light of the fact that petitioner was sentenced under a recidivist statute "we may take into account the government's interest not only in punishing the offense of conviction, but also its interest 'in dealing in a harsher manner with those who by repeated criminal acts have shown that they

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12. The probation report calculated that petitioner had 17 prior felony and 25 prior misdemeanor convictions. CT at 231. It appears that this includes petitioner's juvenile record. The California Court of Appeal stated that petitioner had five felony convictions and 17 misdemeanor convictions. Respondent's Exhibit A, p. 3.

are simply incapable of confirming to the norms of society as established by its criminal law,'" Bland, 961 F.2d at 129 (quoting from Rummel v. Estelle, 445 U.S. 263, 276, 100 S. Ct. 1133,1140 (1980)), surely, petitioner's record qualifies him for harsh treatment under California's recidivist "three strikes" sentencing scheme.

Moreover, the result in this case is supported by Hutto v. Davis, 454 U.S. 370, 102 S. Ct. 703 (1982) in which the defendant's sentence of forty years in prison (two consecutive sentences of twenty years), based upon a seizure of nine ounces of marijuana and evidence of sale to others, was upheld against an Eighth Amendment challenge. The lower courts substitution of their own judgment for an appropriate punishment for the small amount of marijuana involved in lieu of the judgment of the Virginia Legislature, and the disregard of the Supreme Court's Rummel precedent, brought a sharp rebuke from the Supreme Court. And, the Hutto v. Davis case did not even involve a recidivism analysis.[13]

The California Court of Appeal's denial of this claim was not an unreasonable application of clearly established federal law. Accordingly, this claim should be denied.

D. Ex Post Facto

Petitioner argues that his prior felony convictions cannot be counted as strikes because they occurred before March 1994 when the three strikes law was enacted. As strikes, the court used his 1984 robbery conviction and his 1976 assault with a deadly weapon conviction. Petitioner contends that use

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13. Moreover, the case of Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001 (1983), in which the Supreme Court did strike down a sentence as being disproportionate and in violation of the Eighth Amendment, is quite distinguishable. In that case the defendant received a life without parole sentence for conviction related to small amount financial crimes. Petitioner herein will be eligible for parole in approximately twenty years, and his recidivist record which includes violent felonies is much worse than that of defendant Helm.

of these convictions as strikes violates the Ex Post Facto Clause.

A law violates the Ex Post Facto Clause only if it: 1) punishes as criminal an act which was innocent when committed; 2) makes a crime's punishment greater than when the crime was committed; or 3) deprives a person of a defense available at the time the crime was committed. Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715 (1990). The second type of ex post facto problem is at issue here.

The application of an enhancement due to a prior conviction is not a violation of the Ex Post Facto Clause of the United States Constitution. McDonald v. Massachusetts, 180 U.S. 311, 312-13, 21 S. Ct. 389 (1901); United States v. Sorenson, 914 F.2d 173, 174 (9th Cir. 1990). The enhancement is not a penalty for the prior offense. McDonald, 180 U.S. at 312-13. It is the repetitive nature of the present offense that the enhancement punishes. Id. "The statute, imposing a punishment on none but future crimes, is not ex post facto." Id. at 313. Recidivist statutes do not violate the Ex Post Facto Clause if they are on the books at the time the present offense was committed. See United States v. Ahumada-Avalos, 875 F.2d 681, 683-84 (9th Cir. 1989).

The Three Strikes law was on the books when petitioner committed his present offense. The law does not alter petitioner's punishment for his two strike convictions, but imposes a harsher penalty for his current offense because he is a repeat offender. The use of the prior convictions to enhance the present conviction does not violate the Ex Post Facto Clause. Accordingly, this claim should be denied.

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

"Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: June 29, 1999.

/s/
GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

FILED
BY _____ DEPUTY
MAY 24 1999
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
CLERK, U.S. DISTRICT COURT
MAY 27 1999
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

EARNEST BRAY, JR.,

Petitioner,

v.

EDDIE YLST, Warden,

Respondent.

No. CV 98-4672-R(BQR)

ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is denied and dismissed.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 24, 1999

[SIGNATURE]
HONORABLE MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

FILED
CLERK, U.S. DISTRICT COURT
MAR 31 1999
CENTRAL DISTRICT OF CALIFORNIA
BY [INITIALS] DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

EARNEST BRAY, JR., Petitioner, v. EDDIE YLST, Warden, Respondent.	No. CV 98-4672-R(BQR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to United States District Judge Manuel L. Real pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

Petitioner Earnest Bray, Jr. (hereinafter referred to as "Petitioner") filed a "Petition for Writ of Habeas Corpus by Person in State Custody" on June 9, 1998. Respondents filed an Answer and Return on July 1, 1998 and July 29, 1998, respectively. Petitioner filed a Traverse on

August 18, 1998.

II.

BACKGROUND

On March 17, 1995, petitioner was convicted by a jury of petty theft with a prior conviction in violation of California Penal Code Section 666. The jury also found that Petitioner had four prior robbery convictions, which qualified as "strikes" under the Three Strikes Law. Pursuant to Penal Code Section 667.5(b) the jury additionally found that petitioner had previously been convicted of two robberies and had served prison terms for those robberies. Under the Three Strikes Law, petitioner was sentenced to state prison for a term of 25 years to life.

Petitioner appealed his conviction which was affirmed by the California Court of Appeal on April 26, 1996. Petitioner filed a petition for review in the California Supreme Court which was denied on July 10, 1996.

Petitioner filed a petition for writ of habeas corpus in the Los Angeles Superior Court on May 20, 1997. The petition was denied on June 25, 1997.

III.

STATEMENT OF FACTS

On March 28, 1994, Petitioner was caught attempting to leave the Wherehouse video store in the Long Beach Mall without paying for three video cassettes. [Reporters Transcript (hereinafter "R.T.") 26-30.] Petitioner was detained by store clerks, turned over to mall security, and eventually arrested by officers of the Long Beach Police Department. [R.T. 34-36, 47-50] Petitioner waived his constitutional rights and admitted the thefts to police officers. [R.T. 47-50]

IV.

PETITIONERS' CONTENTIONS

Petitioner contends the following inter alia:

1. The imposition of a twenty-five years to life sentence pursuant to the Three Strikes Law constitutes cruel and/or unusual punishment under the state and federal constitutions;

2. The provisions of the Three Strikes Law do not apply to petty theft because petty theft is not a felony offense; and

3. CALJIC No. 2.90, as revised in 1994, failed to specify the degree of certainty required to find someone guilty beyond a reasonable doubt.

V.

DISCUSSION

For all of the following reasons, the petition should be denied and dismissed.

A. Applicability of AEDPA

The petition herein was filed after the President signed into law the Anti-terrorism and Effective Death Penalty Act of 1996 (the "Act"). Accordingly, to the extent petitioner has stated otherwise cognizable federal claims, the Court concurs with respondents that its consideration of this claim is governed by the provisions of the Act. Under 28 U.S.C. § 2254(d), as amended by the Act:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -- (1) resulted in a decision

> that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings."

Thus, under Section 2254(d), the federal court must first determine whether there is a qualifying state court decision. If there is a qualifying state court decision, the federal court must determine whether (a) the decision was contrary to clearly established federal law as determined by the United States Supreme court, or (b) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

B. Petitioner Has Failed To Raise A Federal Question With Respect To Part of Ground One And Ground Two

Petitioner alleges in ground one that his state prison sentence violates prohibitions against cruel and/or unusual punishment under the state constitution. This portion of petitioner's argument does not raise a federal constitutional issue and therefore must be dismissed.

In ground two of the petition, petitioner argues that a petty theft with a prior is not a third strike felony offense under California Three Strikes Law.

The California Court of Appeal held:

> "We reject Bray's contention that petty theft with a prior is not a felony for purposes of the three strikes law. Sections 17, 666; People v. Martin, (1995) 32 Cal. App. 4th 656, 660 [a prior conviction is the basis to elevate a petty theft to a felony); People v. Bouzas (1991) 53 Cal. 4th 467, 471 [a court is given

> discretion under sections 666 to treat petty theft with a prior as a felony]; see also, People v. Hamilton, (1995) 40 Cal. App. 4th 1615; People v. Dent, (1995) 38 Cal. App. 4th 1726; People v. Loomis, (1995) 42 Cal. App. 4th 404, review granted November 16, 1995 (SO49374).) People v. Bouzas, supra, 53 Cal. 3d 467, upon which Bray relies, do not directly consider the issue raised and thus does not support Bray's position.

The statutory interpretation of California's Three Strikes Law is a state issue. See, Snook v. Wood, 89 F.3d 605 (9th Cir. 1996); Peltier v. Wright, 15 F.3d 860, 861-62 (9th Cir. 1994) (federal habeas unavailable for error in interpretation of state law). Therefore, ground two is not a federal question and must be dismissed.

C. The Trial Court's Instruction To The Jury Of CALJIC 2.90 Was Not Improper

Petitioner contends that the trial court violated his constitutional rights in sentencing petitioner to twenty-five years to life in state prison and in instructing the jury with revised CALJIC No. 2.90.

With respect to this claim, the California Court of Appeal's decision on direct appeal constitutes the qualifying state court decision, for purposes of Section 2254(d). Under Ylst v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 115 L. Ed. 2d 706 (1991), it may be presumed that the California Supreme Court by its silent denial of the petition for review, did not intend to change the appellate court's reasoned decision rejecting the claim. See, 501 U.S. at 803-04.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 68 (1991); see 28 U.S.C. § 2254(a). Habeas relief is not available for an alleged error in the interpretation or application of state law. Estelle v. McGuire, 502

U.S. at 68; Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991); see also Dugger v. Adams, 489 U.S. 401, 409 (1989) ("the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution").

To the extent petitioner claims the jury instruction was incorrect under state law, his claim is not cognizable on federal habeas review. Estelle v. McGuire, 502 U.S. at 71-72. To merit relief, petitioner must show the instructional error so infected the entire trial that the resulting conviction violated due process. Id.; Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Cupp v. Naughten, 414 U.S. 141, 147 (1973). The allegedly erroneous instruction must be considered in the context of the trial record and the instructions as a whole. Estelle v. McGuire, 502 U.S. 62, 72 (1991); Henderson v. Kibbe, 431 U.S. at 156; Cupp v. Naughten, 414 U.S. at 146-47.

In Victor v. Nebraska, 511 U.S. 1239, 114 S. Ct. 1239, 1243-49 (1994)[2/] the Supreme Court examined the constitutionality of California's and Nebraska's reasonable doubt instructions. The Supreme Court unanimously found California's reasonable doubt instruction constitutional.

"The beyond a reasonable doubt standard is a requirement of due process but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, 114 S. Ct. at 1243. The Constitution does not require "that any particular form of words be used" for the reasonable doubt jury instruction so long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt. Id., (citing Jackson v. Virginia, 443 U.S. 1307, 1320 n.14 (1979).) Rather, "taken as a whole, the instruction must correctly convey the concept of reasonable doubt to the jury". Id. (quoting Holland v. United States, 248 U.S. 121, 140 (1954)). The proper inquiry is not whether the

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2. The Supreme Court decided Sandoval v. California together with Victor v. Nebraska.

instruction could have been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it. Id.

Use of the phrase "moral certainty" does not automatically render the instruction unconstitutional. Victor v. Nebraska at 1246, 1250. A reference to substantial doubt alone is not sufficient to render a reasonable doubt instruction unconstitutional. Id. at 1250. Neither does the use of the phrase "strong probabilities" render the instruction unlawful. Id. at 1251.

This Court has duly reviewed the California Court of Appeal's rationale for rejecting petitioner's claim.

> "Finally, we reject Bray's contention that the current version of CALJIC No. 2.90 fails to specify the degree of certainty required for proof beyond a reasonable doubt. This instruction is identical to the language, 'suggested' in People v. Freeman, (1994) 8 Cal 4th 450, 504, fn.9, and is therefore, binding on us (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 455). While we agree with Bray that the issue should be revisited to determine whether the United States Supreme Court decision in Victor v. Nebraska, (1994) 511 U.S. ____ [127 L. Ed. 2d 583, 114 S. Ct. 1239], which led to our Supreme Court' s decision in Freeman, really meant to equate `abiding conviction', without further definition, with proof beyond a reasonable doubt, that is an issue for our Supreme Court, not us."

Based upon this Court's review of the record, this Court concurs with the California Court of Appeal. This Court, therefore, finds and concludes that the Court of Appeal's decision rejecting this claim neither was contrary to nor involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court.

D. Petitioner's Sentence Does Not Violate The Prohibition Against Cruel And/Or Unusual Punishment

Petitioner contends his sentence violates the prohibition against cruel and/or unusual punishment under the federal Constitution.

With respect to this claim, the California Court of Appeal's decision on direct appeal constitutes the qualifying state court decision, for purposes of Section 2254(d). Under Ylst v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 115 L. Ed. 2d 706 (1991), it may be presumed that the California Supreme Court by its silent denial of the petition for review, did not intend to change the appellate court's reasoned decision rejecting the claim. See, 501 U.S. at 803-04.

The Court of Appeal held as follows:

> "We *reject* Bray's contention that his sentence constitutes cruel and unusual punishment. A penalty offends the proscription against cruel and unusual punishment only when it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notion of human dignity. (In re Lynch, (1972) 8 Cal. 3d 410, 424). Contrary to Bray's suggestion, the three-pronged approach outlined in Lynch does not require us to give any weight at all to the relatively minor nature of his current offense. It permits us to focus on the offender rather than the offense, and the danger he poses to society. (Id. at pg. 425-427.) Here, Bray's record provides the justification for his sentence.
>
> In 1979, when Bray was 19, he committed his first two robberies, during which a cohort used a firearm and fired shots at one of the victims. Four months later, Bray committed a third armed robbery. He

was sentenced to concurrent terms for these three offenses and remained in prison until November 1981, at which time he was released on work furlough. That term of incarceration did not put an end to Bray's life of crime and in July 1985, he was convicted of possession of a dangerous weapon. He was placed on probation with county jail time, to no avail. About the time his probation ended, Bray committed yet another robbery (his fourth). He was again sentenced to state prison, paroled in June 1989, and then discharged in July 1990. Within weeks, he was charged with battery (although those charges were later dismissed). In September 1991, he was convicted of a drug charge and was sentenced to another 90 days in jail. His current offense was committed on March 1994 . . . but that wasn't the end. While out on bail, he committed another petty theft.

"Quite clearly, Bray' s sentence is a result of his recidivist behavior and it is that behavior that justifies the twenty-five years to life term. Given Bray's inability to respond to shorter sentences, it is clear that this lengthy sentence is not cruel or unusual but simply the only way to protect society from his continuing offenses. (People v. Cartwright, (1995) 39 Cal. App. 4th 1123, 1136-37; People v. Ingham, (1995) 40 Cal. App. 4th 1397, 1415; People v. Gore, (1995) 42 Cal. App. 4th 1, 14, review granted November 22, 1995 (S058866); People v. Drew, (1995) 40 Cal. App. 4th 811, 819 (review granted March 14, 1996) (S050984); People v. Kinsey, (1995) 40 Cal. App. 4th 1621, 1631).

"For the reasons stated in People v. Markson, (1995) 41 Cal. App 4th 387, 392, review granted March 21,

> 1996 (SO5106) People v. Spears, (1995) 40 Cal. App. 4th 1683, 1688-1690, People v. Kinney, supra, 40 Cal. App. 4th at pg. 1629, and People v. Cartwright, supra, 39 Cal. App. 4th at pgs. 1133-1134, we reject Bray's contention that the three strikes law was improperly enacted as an urgency measure." (California Court of Appeal Opinion pg. 3-4).

Based upon this Court's review of the record, this Court concurs with the California Court of Appeal. This Court, therefore finds and concludes that the Court of Appeal's decision rejecting this claim neither was contrary to nor involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court.

VI.

RECOMMENDATION

For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that the Court issue an Order: 1. Approving and adopting this Report and Recommendation; and 2. directing that Judgment be entered denying and dismissing the petition.

DATED: 3-30-99

[SIGNATURE]
BRIAN QUINN ROBBINS
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as

provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

MS. DELPH: I'm objecting to the speculative nature of the witness' statement when he said it looked like he was going to run.

THE COURT: All right. That part of the answer will be stricken and sustained.

Ask your next question.

MR. SHEAFFER: Q. When you were speaking with him outside the store and said "just give it back –"

A. Um-hum.

Q. – was that before or after the security guards got involved?

A. That was before.

Q. Okay.

And what did the defendant do when you made that statement?

A. He went to pull it out and he moved forward like he was going to run, you know.

Q. He leaned forward?

A. Yeah. He was gonna like run for it, you know.

Q. You said he went to pull it out?

A. Uh-huh.

Q. Did you see what he pulled out?

A. There was a steering wheel alarm you put on the steering wheels.

Q. What did he do with that item when he pulled it out?

A. He didn't take it all the way out, he just took it half out and he went to run. And then he started wrestling on the ground.

RT 117.

. . .

Q. Did he do that?

A. No, he didn't.

Q. What happened?

A. He – he kept refusing.

And then we finally said, "If you have anything, to just hand it over and just walk away."

Q. Did he hand something over?

A. A few moments later.

Q. What did he do?

A. He handed us a car alarm. It's a Swat Car Alarm.

Q. Did you see where he got that from?

A. From the left side of his jacket, the left inside of his jacket.

Q. He was wearing a jacket?

A. Yes, he was.

Q. What happened when he gave you the alarm?

A. When he gave it to us, he didn't just hand it to us. He put like both hands up. And he tried to lunge forward trying to push us out of the way to run or to just push us.

Q. I'm sorry, could you step down here, please?

A. Yes.

Q. I'd like you to demonstrate to the jury what he did. You be him and I'll be you.

A. He put the merchandise out and he point forward like that to give it to us.

MR. SHEAFFER: Indicating both hands coming forward at about shoulder level directly towards my chest, Your Honor.

THE COURT: Yes.

MR. SHEAFFER: Q. What did you do?

A. I was outside. I asked my supervisor that was there.

Q. Okay.

In the demonstration you just made, that was directed toward your supervisor?

A. Yes.

Q. What did you do?

A. Well, at that time they both grabbed hands and – but they just struggled. And I just basically, just to get him down on the ground.

Q. Okay. Thank you.

Have a seat.

So you took him to the ground?

A. Actually, we both did.

Q. Did you recover the car alarm?

A. Yes, we did.

Q. What did you do with it?

A. We gave it to Daniel.

Q. And did you see where he went with it?

A. He went inside the store. I didn't really recall. I wasn't focused on him.

Q. You were focused on the defendant?

A. Yes.

Q. Do you recall whether or not the store alarm went off again when Danny went back in the store?

A. I don't recall. I don't recall.

Q. Why is that?

A. I was about 30 feet away from the door on the side by – behind a car.

Q. Was something occupying your attention?

A. I'm on the ground.

Q. Was something occupying your attention?

A. Yes.

Q. What?

A. The struggle with the defendant.

Q. Did he continue to struggle after you took him there?

A. Yes.

Q. Were you able to gain control over him?

A. Yes, we were.

Q. What did you do after you got control of him?

A. We put cuffs on him and we walked him back into the store.

Q. Were the police called?

A. Yes, they were.

Q. Do you recognize the gentleman seated here at counsel table wearing – the man that I have my hands on his shoulder?

A. I believe he was the officer that arrived.

Q. Okay.

When he got there, when the police arrived, were they in uniform or plain clothes?

A. They were in uniform.

Q. And did one of the officers come in the store?

A. Yes.

Q. And did he go with you to a location where you had the defendant?

A. Yes.

Q. And where was that?

A. In the office in Walgreen's.

Q. Okay.

Were any photographs taken back in that office?

A. Yes.

Q. Who took them?

A. Huh.

Q. Who took them?

A. I did.

Q. Why?

A. For store records.

Q. What did you take photographs of?

A. Of the merchandise and of the subject of Mr. Brown.

Q. What kind of camera did you use?

A. It was a Polaroid.

Q. Okay.

Do you recall how many photos you took?

A. I believe I took three. One was blurred, and then we took another one of the merchandise, which is clear, and then the one of Mr. Brown.

Q. Okay.

I have three photographs, they're Polaroids, and they've been marked on the back with orange stickers. I'm going to show you the one marked orange sticker with the No. 1 on it, People's Exhibit No. 1.

Would you look at that?

A. Yes.

Q. Would you look at the photograph, please?

What does it depict?

A. What?

Q. What's shown in that photograph?

A. Mr. Brown.

Q. Who took that photograph?

A. I did.

Q. And does that photograph accurately show the way Mr. Brown looked when you took the photo?

A. Yes.

Q. Okay.

Photograph with the orange sticker on the back, No. 2, People's Exhibit No. 2, do you recognize what's shown in this photograph?

A. Yes.

Q. What is shown?

A. This is the merchandise he had took from the store, swat alarm.

Q. Is that the merchandise you saw handed or thrust towards your supervisor?

A. Yes.

Q. Who took this photograph?

A. I did.

Q. And does it accurately reflect the way the

merchandise looked when you took the photo?

A. Yes.

Q. One final photograph marked on the back with an orange sticker with a No. 3 on it, People's Exhibit No. 3.

What's depicted in this photograph?

A. The price of the misdemeanor.

Q. Okay.

And is that the same item –

A. Yes, it is.

Q. That's depicted in No. 2?

A. Yes, it is.

Q. Who took this photo?

A. I did.

Q. And does the photo accurately depict the way the merchandise looked when you photographed it?

A. Yes.

Q. Now, you said you thought one of the photographs was blurry at the time you took it?

A. Yes.

Q. Which one of the photos was it?

A. This one.

Q. Reflecting No. 3?

A. Yes.

Q. Now, in this photo now, there's a red circle around that price sticker; is that correct?

A. Yes.

Q. That red circle wasn't on the item when you photographed it, was it?

A. No, it wasn't.

Q. Okay.

MR. SHEAFFER: I have no further questions. Thank you, Your Honor.

THE COURT: Cross-examination?

CROSS-EXAMINATION BY:

MS. DELPH: Q. Mr. Perez, after this incident

was over, did you talk to Mr. Lozano about what had happened –

A. I believe so.

Q. – that night?

A. Yes.

Q. Did you talk to him after the incident occurred about the – about what happened?

A. Like a time later?

Q. Um-hum.

A. No.

Q. So you talked to him about that it that night?

A. Yes.

Q. Have you ever talked about it since the night of the incident?

A. No.

Q. Do you still work at Walgreen's sometimes?

A. No.

Q. Okay.

So – so on the night of this incident, you were the only one that had been working there, but your supervisor was there just talking to you?

A. Yes.

Q. Okay.

Now, when you talked to Mr. Lozano about what happened, did he refresh your recollection in any way or fill in the blanks for you?

MR. SHEAFFER: Objection, vague as to time.

THE COURT: Compound. Vague. Sustained.

MS. DELPH: Excuse me. I'm sorry. Let me rephrase it.

Q. On the night that you spoke to Mr. Lozano about the incident, did you – did he tell you information that you hadn't witnessed?

A. He just said he walked past the registers without making a purchase.

Q. Okay.

A. And then the alarm went off and that's when everything happened.

Q. And that's the extent of your conversation about it?

A. That's as far as I recall, yes.

Q. Okay.

Did you see Mr. Brown go inside the store?

A. No, I didn't.

Q. Okay.

Now, when – do you recall where you were standing when you first saw Mr. Brown as he came out this door?

A. Yes, I was at the exit door.

Q. Oh, so you were standing right at the door?

A. Yeah, on the outside, actually.

Q. Okay.

Now, the exit doors, is there anything that triggers them to open, or do you have to manually open them?

A. There's like a sensor.

Q. Okay.

So you just walk up to them and they'll open automatically?

A. Yes.

Q. All right.

Did you hear whether or not the alarm went off before Mr. Brown exited the store?

A. Yes.

Q. Okay.

But the doors were closed?

A. They open up as you approach the alarm.

Q. Oh, I see. Okay.

Now, and you were standing just outside of the doors?

A. Yes, just – if you're walking out, I was just outside on the left.

Q. Alrighty.

Was Mr. Brown running?

A. No, he wasn't.

Q. All right.

And at that point you detained him, how did you do that?

A. Well, we – well, it was a struggle down. And then once we got him down, we just had to get him into some kind of control hold, you know, just to put his hands behind his back, then –

Q. You testified on direct that initially when you had contact with him with your boss, right, that Mr. Brown attempted to hand something to your boss?

A. My supervisor, yes.

Q. Your supervisor.

Where were you standing when this occurred?

A. Just to the – to the left of Mr. Brown, I believe it was.

Q. Where was Mr. Brown standing in – as it relates to the front door of the store; do you recall?

A. He was standing in – in front of the entrance door at that time. We kind of moved. He moved.

Q. Okay.

So if I'm – there's only one entrance and exit door, right?

A. Right.

Q. And they're located right next to each other?

A. Yes.

Q. If I'm standing and I'm facing the entrance and the exit door, is the entrance door to the right of this security alarm or to the left?

A. Well, there's an alarm –

MR. SHEAFFER: Objection, assumes facts not in evidence.

THE COURT: No. Overruled.

THE WITNESS: There's an alarm on both doors.

MS. DELPH: Q. Okay. So let me ask it again. Is the entrance door to the right of the exit door?

A. Yes.

Q. Okay.

So when you contacted Mr. Brown initially with your supervisor, he was to the right by the entrance door?

A. Yes.

Q. Do you recall, did you or your supervisor say something to Mr. Brown to get – to get him to take something out of his jacket?

A. Yes.

Q. Okay.

And what was that, do you remember?

A. Oh, we asked him to pass the doors. He refused. And then we finally said, "Well, if you have anything, just to give it to us and just walk away."

Q. Okay.

So you said, "If you have anything" –

A. Yes.

Q. – and at that point he –

A. Yes.

Q. Okay.

And was the item that's depicted in the photograph, was that – did that remain on Mr. Brown's person anywhere after the – after you and your supervisor confronted him initially?

Do you understand what I'm saying?

A. No, I don't.

Q. In other words – then Mr. Brown left, right, and you had to chase after him?

A. No. No.

Q. I'm sorry?

A. I said he handed it to us and I said he lunged forward as if he was going to push us or just push it out of the way just to run away.

Q. But he had the item in his hand?

A. Yes.

Q. What happened to the item?

A. We grabbed it and then gave it to Daniel.

Q. Okay.

So you and your – who grabbed it?

A. My supervisor.

Q. And then your supervisor gave it to Danny?

A. Yes.

Q. And then you chased Mr. Brown?

A. There was no chase.

Q. Okay.

You – you had to put him down on the ground?

A. Yes.

Q. Okay.

After he gave the item –

A. After he gave us the merchandise, he had both hands up as if he was going to push us or break through us. And at that time, both arms locked between my supervisor and him.

Q. Okay.

A. And then –

Q. Go on. I'm sorry, I didn't mean to interrupt.

A. And then it was just a struggle, basically.

Q. Okay.

So Mr. Brown didn't push anybody. You just thought he was going to?

A. Yes.

Q. All right.

Now, before the pushing or before the motion that you thought was going to be pushing, did Mr. Brown – did he get agitated?

A. I don't recall.

Q. Did he ask you for your badge number or your name or he wanted to know who your supervisor was?

A. Not that I recall, no.

Q. Okay.

Do you recall having a conversation with him at all?

A. Afterwards.

Q. Okay.

Did he – is that the time that he asked for your badge number and some information from you?

A. He originally asked for my name and who I was.

Q. Okay.

Afterwards?

A. Yes.

Q. All right.

. . .

RT 157-169.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,	)	C023139
	)	
Plaintiff and Respondent,	)	(Super. Ct.
	)	No. SC059273A)
v.	)	
	)	FILED: May 21,
RICHARD NAPOLEON BROWN,	)	1997
	)	
Defendant and Appellant.	)	

A jury convicted defendant Napoleon Brown of what is commonly termed petty theft with a prior (Pen. Code, § 666); thereafter, in a trial by court, defendant was found to have been convicted of two prior strikes (Pen. Code, §§ 667, subd. (d), 1170.12, subd. (B)). He was sentenced to state prison for a term of 25 years to life.

On appeal, defendant contends the term imposed is disproportionate to the offense and, therefore, violates the state and federal constitutional prohibitions against cruel and unusual punishment. We shall affirm.

It is the function of the Legislature to define crimes and prescribe punishments, and such questions are in the first instance for its judgment alone. (*In re Lynch* (1972) 8 Cal.3d

410, 414.) However, the legislative authority is ultimately limited by the constitutional provision forbidding the infliction of cruel or unusual punishment. (*Ibid.*) Article I, section 17 of the California Constitution protects against the imposition of cruel or unusual punishment. "[I]n California a punishment may violate article I, section [17],[1/] of the Constitution if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra*, at p. 424.)

In the present offense defendant was caught by Walgreen's security personnel stealing a car alarm from the store, a fairly nonserious offense in and of itself. However, defendant's criminal history is as follows: In 1969, as a juvenile, defendant was placed in a camp program for a violation of Penal Code section 245. The following year he was committed to the Youth Authority for assaulting a camp ward and running from the camp. In 1971, defendant had separate convictions for second degree burglary (Pen. Code, §§ 459, 460) and robbery (Pen. Code, § 211), and received a state prison sentence for each. In 1976, defendant was convicted of two counts of felony assault (Pen. Code, § 245); again he received a prison sentence. In 1984, defendant was convicted again of robbery (Pen. Code, § 211). This constitutes five prior felony convictions as an adult. Additionally, defendant has 17 misdemeanor convictions.

Consequently, defendant is not being punished for merely being a shoplifter with two prior felony convictions far in his past, as defendant argues. Defendant is a chronic thief and assailant whose behavior is an easy and appropriate fit within the habitual offender law. Given this record, defendant's sentence is not disproportional to the offense within the meaning of the California Constitution.

With respect to the federal Constitution, we simply note if a sentence of life without possibility of parole for a single

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1. Formerly California Constitution, article I, section 6.

offense of possessing more than 650 grams of cocaine is not disproportional under the United States Constitution (see *Harmelin v. Michigan* (1991) 501 U.S. 957, 1009 [115 L.Ed.2d 836, 874]), a fortiori a term of 25 years to life for a person with defendant's record cannot be considered disproportional.

The judgment is affirmed.

MORRISON, J.

We concur:

PUGLIA, P.J.

RAYE, J.

Third Appellate District No. C023139
S062458

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

RICHARD NAPOLEON BROWN, Appellant

Appellant's petition for review DENIED.

FILED: Aug. 18, 1997

Chief Justice

Filed May 29, 1998
JEANNE MILLSAPS, CLERK

By _____
DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN

In the Matter of the Petition of

RICHARD N. BROWN, Case No. SC 059273

Petitioner, ORDER

For Writ of Habeas Corpus.
_____/

A petition for Writ of Habeas Corpus, filed herein on April 15, 1998, contends that petitioner's sentence is invalid because the court failed to consider whether it would exercise the discretion provided by Penal Code §1385(a) to dismiss the prior(s) alleged under Penal Code §667(d) and/or 1170.12(b). The petition asks the court to reconsider the sentence and exercise its discretion to dismiss the prior(s) in view of the recent opinion by the California Supreme Court in *People v. Superior Court (Romero)* (1996) 13 C4th 497, as modified at 13 C4th 1016a.

Good cause appearing therefore, IT IS HEREBY ORDERED THAT:

/__/ The court extends the time in which it may deny the petition or issue the writ or an order to show cause to _____. The extension is required because

of the complexity of, and time required to review, the issues presented by the petition. Rule 260(f) of the California Rules of Court.

/__/ The People are ordered to show cause why the court should not exercise its discretion under Penal Code §1385(a) to strike the prior(s) alleged under Penal Code §667(d) and/or §1170.12(b).

/__/ The return shall be filed on or before _____.

/__/ Hearing on the order to show cause is set for _____.

/__/ _____ is appointed to represent petitioner and shall prepare an order to transport petitioner to court for the hearing on the order to show cause.

/XX/ The Petition for Writ of Habeas Corpus is denied for the following reason(s):

/__/ Relief remains available to petitioner by way of appeal.

/__/ The record establishes the court realized it possessed the discretion to strike the prior(s) without the concurrence of the prosecution and that the court did not do so.

/XX/ Although the record does not reflect the court realized it had the discretion to strike the prior(s) without the concurrence of the prosecution, the record does reflect the court clearly indicated it would not, in any

event, have exercised its discretion to strike the prior(s).

/__/ Petitioner was sentenced pursuant to a plea bargain. Once the court has accepted a negotiated plea, it lacks jurisdiction to alter the terms of the bargain so that it becomes more favorable to petitioner unless both parties to the bargain agree. The petition fails to make a prima facie showing that the People would be amenable to a reconsideration of the sentence.

/__/ The record establishes that it would be a manifest abuse of discretion for the court to have exercised its discretion under Penal Code §1385(a) to strike the prior(s). Therefore, reconsideration of the sentence to determine whether the court would, in light of the decision in *Romero*, exercise its discretion to strike said prior(s) would be an idle act.

Date: 5/29/98

Judge of the Superior Court

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

IN RE RICHARD NAPOLEON BROWN
ON HABEAS CORPUS

C029944
Monterey County
No.

FILED: July 9, 1999

BY THE COURT:

The petition for writ of habeas corpus is denied.

Dated: July 9, 1998

SCOTLAND, Acting P.J.

S072170

IN THE SUPREME COURT OF CALIFORNIA

IN RE RICHARD NAPOLEON BROWN

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

FILED: Jan. 27, 1999

/s/ Mosk
Acting Chief Justice

COURT OF APPEAL - SECOND DIST.
FILED
APR 26 1996
JOSEPH A. LANE _____ CLERK
DEPUTY CLERK

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERNEST BRAY, JR., Defendant and Appellant.	B093289 (Super. Ct. No. NA019462)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

Mary Holbrook, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Sharon Wooden Richard, Jaime L. Fuster, Assistant Supervising Deputy Attorneys General, and Robert W. Hicks, Deputy

Attorney General, for Plaintiff and Respondent.

Ernest Bray, Jr., took three video tapes without paying for them. He was arrested and charged with petty theft with a prior, with allegations that he had suffered four prior serious felony convictions (Pen. Code, § 667, subds. (b)-(i))[1] and served three prior prison terms (§ 667.5, subd. (b).) A jury convicted Bray as charged and returned true findings on the enhancement allegations. Bray's motion to strike the priors was denied and he was sentenced to state prison for a term of 25 years to life. He appeals, claiming instructional error and attacking the three strikes law on the usual grounds. We affirm.

DISCUSSION

I.

We reject Bray's contention that his sentence constitutes cruel and unusual punishment. A penalty offends the proscription against cruel and unusual punishment only when it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. (*In re Lynch* (1972) 8 Cal.3d 410, 424). Contrary to Bray's suggestion, the three-pronged approach outlined in *Lynch* does not require us to give any weight at all to the relatively minor nature of his current offense. It permits us to focus on the offender rather than the offense, and the danger he poses to society. (*Id.* at pp. 425-427.) Here, Bray's record provides the justification for his sentence.

In 1979, when Bray was 19, he committed his first two robberies, during which a cohort used a firearm and fired shots at one of the victims. Four months later, Bray committed a third armed robbery. He was sentenced to concurrent terms for these three offenses and remained

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1. All section references are to the Penal Code.

in prison until November 1981, at which time he was released on work furlough. That term of incarceration did not put an end to Bray's life of crime and in July 1985, he was convicted of possession of a dangerous weapon. He was placed on probation with county jail time, to no avail. About the time his probation ended, Bray committed yet another robbery (his fourth). He was again sentenced to state prison, paroled in June 1989, and then discharged in July 1990. Within weeks, he was charged with battery (although those charges were later dismissed). In September 1991, he was convicted of a drug charge and was sentenced to another 90 days in jail. His current offense was committed on March 1994 -- but that wasn't the end. While out on bail, he committed another petty theft.

"Quite clearly, Bray's sentence is a result of his recidivist behavior and it is that behavior that justifies the twenty-five years to life term. Given Bray's inability to respond to shorter sentences, it is clear that this lengthy sentence is not cruel or unusual but simply the only way to protect society from his continuing offenses. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136-37; *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1415; *People v. Gore* (1995) 42 Cal.App.4th 1, 14, review granted Nov. 22, 1995 (SO48866); *People v. Drew* (1995) 40 Cal.App.4th 811, 819 review granted March 14, 1996 (SO50984); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.)

II.

"For the reasons stated in *People v. Markson* (1995) 41 Cal.App.4th 387, 392, review granted March 21, 1996 (SO1506),*People v. Spears* (1995) 40 Cal.App.4th 1683, 1688-1690, *People v. Kinsey*, *supra*, 40 Cal.App.4th at page 1629, and *People v. Cartwright*, *supra*, 39 Cal.App.4th at pages 1133-1134, we reject Bray's contention that the three strikes law was improperly enacted as an urgency measure."

III.

We reject Bray's contention that petty theft with a prior is not a felony for purposes of the three strikes law. (§§ 17, 666; *People v.*

Martin (1995) 32 Cal.App.4th 656, 660 [a prior conviction is a basis to elevate a petty theft to a felony]; *People v.* Bouzas (1991) 53 Cal.3d 467, 471 [a court is given discretion under section 666 to treat petty theft with a prior as a felony]; see also *People v. Hamilton* (1995) 40 Cal.App.4th 1615; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v. Loomis* (1995) 42 Cal.App.4th 404, review granted Nov. 16, 1995 (SO9374).) *People v. Bouzas, supra*, 53 Cal.3d 467, upon which Bray relies, did not directly consider the issue raised and thus does not support Bray's position.

IV.

Finally, we reject Bray's contention that the current version of CALJIC NO. 2.90 fails to specify the degree of certainty required for proof beyond a reasonable doubt. This instruction is identical to the language "suggested" in *People v. Freeman* (1994) 8 Cal.4th 450, 504, footnote 9, and is therefore binding on us *(Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). While we agree with Bray that the issue should be revisited to determine whether the United States Supreme Court's decision in *Victor v. Nebraska* (1994) 511 U.S. ____ [127 L.Ed.2d 583, 114 S.Ct. 1239], which led to our Supreme Court's decision in *Freeman,* really meant to equate "abiding conviction," without further definition, with proof beyond a reasonable doubt, that is an issue for our Supreme Court, not us.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

VOGEL (Miriam A.), J.

We concur:

SPENCER, P.J.

ORTEGA, J.

SUPREME COURT
FILED
JUL 10 1996
Robert Wandruff Clerk
DEPUTY

Second Appellate District, Division One, No. B093289
S053847

IN THE SUPREME COURTOF CALIFORNIA

THE PEOPLE, Respondent

v.

ERNEST BRAY, Jr., Appellant

Appellant's petition for review DENIED.

GEORGE
Chief Justice

MINUTE ORDER

SUPERIOR COURT OF L.A. SUPERIOR –
SOUTH JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

CURRENT DATE: 06/25/97

CASE NO. NA019462

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

DEFENDANT 01: ERNEST BRAY JR.

COUNT 01: 666 PC FEL – PETTY THEFT W/PRIOR JAIL TERM.

ON 06/25/97 AT 830 AM IN L.A.. SUPERIOR – SOUTH DEPT SOJ

CASE CALLED FOR MISCELLANEOUS

PARTIES: GARY J. FERRARI (JUDGE)
KEVIN LANE (CLERK)
FRANKIE DALTON (REP)
CARRIE L. MASARIK (DA)

DEFENDANT PRESENT, AND WAS REPRESENTED BY
E DICKER DEPUTY PUBLIC DEFENDER

PETITION FOR WRIT OF HABEAS CORPUS IS ARGUED AND DENIED.

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

PETITION FOR WRIT OF HABEAS CORPUS IS ARGUED AND DENIED.

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

CUSTODY STATUS: DEFENDANT REMANDED

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 153--HABEAS CORPUS

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Current through P.L. 107-89, approved 12-18-01

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES
AMENDMENT XIII--SLAVERY ABOLISHED; ENFORCEMENT

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Current through P.L. 107-89, approved 12-18-01

Amendment XIII. Slavery Abolished; Enforcement

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

§ 666. Petty theft; prior conviction of certain offenses; punishment

Every person who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

§ 667. Habitual criminals; enhancement of sentence; amendment of section

(a)(1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined

in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of

subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject

to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(f)(1) Notwithstanding any other law, subdivisions (b) to

(i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(g) Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive,
are to statutes as they existed on June 30, 1993.

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

§ 1170.12. Prior felony conviction; enhancement

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the

manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive

to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d)(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(e) Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (d).

(3)

No. 01-1487

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2001

D.A. Mayle, Warden, Petitioner,
v.
Richard N. Brown, Respondent

Eddie Ylst, Warden, Petitioner,
v.
Ernest Bray, Jr., Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a sentence of 25 years to life in prison, with no possibility of parole for at least 25 years, is grossly disproportionate in violation of the Eighth Amendment and a violation of clearly established law when it is applied for shoplifting a small amount of merchandise.

2. Whether habeas corpus should be granted because the state court decision was "contrary to" and an "unreasonable application" of clearly established federal law when the state court fails to apply the test set out by the Supreme Court for determining when punishment is grossly disproportionate in violation of the Eighth Amendment.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Richard N. Brown and Ernest Bray, Jr., hereby oppose the Petition for a Writ of Certiorari by D.A. Mayle and Eddie Ylst to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Respondent adopts and incorporates by reference all opinions and orders below that are set forth in Appendix to Petition for Writ of Certiorari, Appendices A through K.

STATEMENT OF THE CASE

This matter concerns two separate cases which were consolidated by the Ninth Circuit for briefing and oral argument. Both Richard N. Brown and Ernest Bray, Jr., were sentenced, pursuant to California's "Three Strikes" law, to 25 years to life in prison for shoplifting a small amount of merchandise. The Ninth Circuit issued a decision concerning both cases based on its earlier ruling in Andrade v. Attorney General, 270 F.3d 743 (9th Cir. 2001), cert. granted, 122 S.Ct. 1434 (2002). The State of California has filed a

single petition for certiorari regarding both Brown and Bray.

Richard N. Brown was convicted in 1996 for stealing a car alarm from a Walgreen's store. Findings and Recommendations [of the United States Magistrate Judge], Richard N. Brown v. Mayle, at 1 (Appendix C). He was convicted of petty theft with a prior conviction based on earlier offenses. His prior offenses include two burglary convictions in 1971; two felony counts of assault with a deadly weapon in 1976 (one case); one felony robbery and misdemeanor for being under the influence of a controlled substance in 1984; and seven subsequent misdemeanor convictions (which do not count as strikes under California's three strikes law.) Id. at 8-9. As the Magistrate Judge noted, Brown's prior strikes were 13 and 19 years old at the time of his conviction. Id. at 9 n.9.

Ernest Bray, Jr., was caught on March 28, 1994, stealing three video cassettes from the Wherehouse store in Long Beach Mall. Report and Recommendation of United States Magistrate Judge, Bray v. Ylst, at 2-3 (Appendix E). He was convicted of petty theft with a

prior conviction based on earlier offenses. In November 1981, he was sentenced to concurrent sentences for three robberies committed when he was 19 years old. Id. at 11. In 1985, he was convicted of another robbery. His only other conviction before this instance of shoplifting was in September 1991 for a drug offense for which he was sentenced to 90 days in jail. Id. at 12.

Both Brown and Bray appealed to the California Court of Appeal and argued, among other grounds, that the sentences were grossly excessive and violated the Eighth Amendment. The California Court of Appeal rejected this argument in each case. (Appendixes G and L). In each case, review in the California Supreme Court was sought and denied. (Appendixes H and M). Bray and Brown each filed a timely pro se petition for habeas corpus under 28 U.S.C. §2254. In each case, the petition was denied and Bray and Brown filed pro se appeals.

After the Ninth Circuit issued its decision in Andrade v. Attorney General, on November 2, 2001, the United States Court of Appeals for the Ninth Circuit,

on November 14, 2001, appointed counsel to represent Bray and Brown. The Ninth Circuit asked for briefing and oral argument as to the application of Andrade to the habeas corpus petitions of Brown and Bray. On February 7, 2002, the United States Court of Appeals issued its decision holding that based on Andrade, the sentences imposed on Bray and Brown were grossly disproportionate and thus violated the Eighth Amendment. (Appendix A).

REASONS THE PETITION SHOULD BE DENIED

I. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY APPLIED CLEARLY ESTABLISHED PRINCIPLES

The indeterminate life sentences imposed on Richard N. Brown and Ernest Bray, Jr., for misdemeanor conduct, shoplifting a small amount of merchandise, is a result of laws that are unique to California. California essentially "double counts" the prior offenses. Under California law, the conduct of Brown and Bray generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998). Because of their prior

offenses, Brown's and Bray's misdemeanor conduct, petty theft, were converted by statute into a felony, "petty theft with a prior conviction." California Penal Code Ann. §666. Then, under California's Three Strikes Law, that felony was used to impose a sentence of 25 years to life in prison on each defendant. In other words, the prior offenses were used twice: first to convert a misdemeanor into a felony and then to impose a life sentence based on it being a felony.

The United States Court of Appeals for the Ninth Circuit applied clearly established legal principles to find that the sentences imposed on Brown and Bray constituted cruel and unusual punishment and that relief could be granted on habeas corpus.

A. The United States Court of Appeals for the Ninth Circuit Correctly Applied Well Established Law to Conclude that an Indeterminate Life Sentence is Cruel and Unusual Punishment When Imposed for Shoplifting a Small Amount of Merchandise

The Ninth Circuit's decision was quite narrow. The court was emphatic that "[o]ur decision does not hold the California Three Strikes Law unconstitutional."

App. A., at 30.* The Ninth Circuit simply held that the Eighth Amendment is violated when an indeterminate life sentence is imposed for shoplifting a small amount of merchandise.

The State's petition for certiorari argues that the law is uncertain as to whether grossly disproportionate punishments violate the Eighth Amendment in non-capital cases. Petition for Writ of Certiorari, at 15-19. However, the Ninth Circuit's decision rests on the firmly established principle that grossly

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*In its petition, the State of California suggests that review is appropriate because the Ninth Circuit's decision will unleash a floodgate of habeas petitions by California prisoners. Petition for a Writ of Certiorari, at 22-23 n. 7. n.1. The State bases this entirely on newspaper stories about the decision.

The State's concern is unfounded. According to recent statistics from the California Department of Corrections, 340 people are incarcerated in California whose third strike was "petty theft with a prior." Department of Corrections, State of California, Data Analysis Unit, Estimates of Statistical Analysis Section, Offender Information Service Bureau, "Second and Third Strikes in the Institution Population By Offense Group and Admission of Return Status," September 10, 2001. Some of these individuals might be procedurally barred from seeking relief because of factors such as the statute of limitations on bringing habeas corpus petitions, the bar on successive petitions, and exhaustion requirements. Thus, although affirming the Ninth Circuit undoubtedly would benefit some other prisoners, this is not likely to be a large number.

disproportionate punishments violate the cruel and unusual punishment clause of the Eighth Amendment. In Weems v. United States, 217 U.S. 349, 371 (1910), this Court held that the Eighth Amendment prohibits "greatly disproportioned" sentences. On many other occasions, this Court has declared sentences unconstitutional as being "grossly disproportionate." In Solem v. Helm, 463 U.S. 277, 288 (1983), the Court observed that "the Court has continued to recognize that the Eighth Amendment prohibits grossly disproportionate punishments."

In Harmelin v. Michigan, 501 U.S. 957 (1991), seven Justices expressly recognized that grossly disproportionate sentences are unconstitutional. In Harmelin, Justice Scalia argued that the Eighth Amendment does not prohibit disproportionate sentences. Id. at 985. However, only Chief Justice Rehnquist joined this part of Justice Scalia's opinion.

Justice Kennedy, concurring in part and concurring in the judgment, expressly disagreed with Justice Scalia, and declared: "The Eighth Amendment does not require strict proportionality between crime and

sentence. Rather, it forbids only extreme sentences that are 'grossly' disproportionate to the crime." Id. at 1001 (Kennedy, J., concurring in part and concurring in the judgment). Justices O'Connor and Souter joined this opinion and its conclusion that grossly disproportionate punishments are unconstitutional. The four dissenting Justices in Harmelin, actually the plurality in the case, argued that the Eighth Amendment prohibits disproportionate sentences and contended that "gross disproportionality" was too restrictive a constitutional standard. Id. at 1009, 1012 (White, J., dissenting); id. at 1027 (Marshall, J., dissenting).

No decision since Harmelin has questioned the principle established by almost a century of Eighth Amendment decisions: grossly disproportionate punishments are cruel and unusual punishment in violation of the Eighth Amendment. In fact, in United States v. Bajakajian, 524 U.S. 321, 336 (1998), this Court, in invalidating a forfeiture as violating the Eighth Amendment, stated: "[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clauses precedents."

Simply put, if any sentence is "grossly disproportionate," it is an indeterminate life sentence, with no possibility of parole for 25 years, for shoplifting a small amount of merchandise. The Ninth Circuit followed this Court's command that proportionality is to be determined by "objective factors to the maximum extent possible." Rummel v. Estelle, 445 U.S. 263, 274-275 (1980). Specifically, the Ninth Circuit expressly applied the test articulated by this Court in Solem v. Helm, 463 U.S. 277, 292 (1983): "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

Under this test, the Ninth Circuit properly found that indeterminate life sentences imposed on Brown and Bray for shoplifting violate the Eighth Amendment. First, the Court compared the gravity of the offense and the harshness of the punishment. The offenses were

minor, petty theft, but the punishment was enormous: a sentence of 25 years to life in prison.

The Ninth Circuit then properly applied the second factor from the Solem test: the sentences imposed on others in the same jurisdiction for similar offenses. Under California law, Brown's and Bray's crimes constituted petty theft, a misdemeanor punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998).

Finally, the Ninth Circuit applied the third Solem factor in evaluating gross disproportionality: the sentences imposed in other jurisdictions. California is the only state in which misdemeanor shoplifting could lead to an indeterminate life sentence with no possibility of parole for 25 years. No other state in the country has such a sentencing scheme where misdemeanor conduct can be the basis for an indeterminate life sentence. See People v. Dozier, 93 Cal.Rptr. 600, 605-606 (2000) (a sentence under the Three Strikes law is, under California law, an "indeterminate life sentence.") As Justice Stevens noted: California is the "only state in the country in

which a misdemeanor could receive such a severe sentence." Riggs v. California, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari).

In Rummel v. Estelle, this Court repeatedly emphasized that it was considering permissible punishment for felony conduct. See 445 U.S. at 274, 278, 284. In fact, the Court stressed the "line dividing felony theft from petty larceny." Id. at 284. Rummel involved felony theft, while these cases concern what California deems to be petty theft.

Justice Stevens recently explained the importance of this distinction: "While this Court has traditionally accorded to state legislatures considerable (but not unlimited deference) to determine the length of sentences 'for crimes concededly classified and classifiable as felonies,' petty theft does not fall into that category." Riggs v. California, 525 U.S. at 1114 (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). Indeed, Justice Stevens said that punishing petty theft with a prior conviction by

imposing a life sentence is closely analogous to the punishment declared unconstitutional in Solem: "[P]etty theft has many characteristics in common with the crime for which we invalidated a life sentence in Solem, uttering a 'no account' check for $100. 'It involves neither violence nor (the) threat of violence to any person'; the amount of money involved is relatively small; and the State treats the crime as a felony (here, only under some circumstances) pursuant to a quirk in state law." Id. at 1114 (citations omitted).

In Harmelin v. Michigan, Justice Scalia, joined only by Chief Justice Rehnquist, recognized the possibility of "extreme examples" of very harsh punishments for relatively trivial offenses, but said that "they are certain never to occur." 501 U.S. at 985-986. But that is exactly what occurred in this case: Richard N. Brown and Ernest Bray were sentenced to life imprisonment for shoplifting.

B. The Sentence of 25 Years to Life in Prison Imposed on Richard Brown and Ernest Bray Violates Clearly Established Constitutional Principles and Thus Relief Is Appropriate Under a Writ of Habeas Corpus

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant relief if the state court's decision is "contrary to, or involves an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(i). This Court has stated that the standard for relief is whether the sentence is "contrary to . . . clearly established federal law, as determined by the Supreme Court of the United States" or that it was an "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 120 S.Ct. 1495, 1423 (2000).

The Ninth Circuit granted relief because it concluded that the California Court of Appeals' decisions were "contrary to" clearly established law "because the state court decision in both cases failed to apply some or all of the required Supreme Court

analysis." Appendix A, at 9. The Court explained: "Having determined that there was clear error sufficient to satisfy the 'unreasonable application' clause, we hold *a fortiori* the state court decision was 'erroneous' and merits habeas relief under the 'contrary to clause.'" Id. 28.

The California Court of Appeal failed to apply this Court's decision in Solem v. Helm and other cases holding that grossly disproportionate punishments violate the Eighth Amendment. The Ninth Circuit thus properly found that the California Court of Appeal decisions were "contrary to" clearly established law and that an indeterminate life sentence for shoplifting was an unreasonable application of this clearly established law.**

**The state in its petition for certiorari also raises an issue concerning the appropriate methodology for habeas corpus review. Petition for Writ of Certiorari, at 23. However, the state never explains why the choice of methodology would matter at all in this case. The Ninth Circuit found that the sentence imposed on Brown and Bray, 25 years to life in prison, was contrary to clearly established law. This is exactly the test prescribed in the statute and elaborated upon in Williams v. Taylor and Penry v. Johnson, 532 U.S. 782 (2001).

II. IF CERTIORARI IS GRANTED, THIS CASE SHOULD BE HELD IN LIGHT OF THIS COURT'S GRANT OF CERTIORARI IN LOCKYER V. ANDRADE AND EWING V. CALIFORNIA

On April 1, 2002, this Court granted certiorari in two cases concerning the constitutionality of California's Three Strikes law as applied to trivial offenses. Lockyer v. Andrade, 270 F.3d 743 (9th Cir. 2001), cert. granted, 122 S.Ct. 1434 (2002).; Ewing v. California, unpublished opinion, cert. granted, 122 S.Ct. 1435 (2002).

In Andrade, the United States Court of Appeals for the Ninth Circuit ruled that it violated the Eighth Amendment to sentence a person to 50 years to life for shoplifting $153 worth of videotapes. After Andrade was decided by the Ninth Circuit on November 2, 2001, the Court appointed counsel to represent Brown and Bray and asked for briefing and argument as to the application of its decision in Andrade to these cases.

The Ninth Circuit's decision in this case was expressly based on its earlier ruling in Andrade. The Court repeatedly emphasized that it was "applying Andrade here." Appendix A, at 9. In fact, the Ninth Circuit labelled the crucial section of its opinion,

"Application of Andrade to Bray's and Browns' Sentences." Id. at 13. Every part of the Ninth Circuit's opinion focused on whether there is any meaningful distinction between the punishment imposed on Andrade and that imposed on Brown and Bray. Concluding that there was not such a distinction, the Court applied Andrade to find that the sentences imposed on Brown and Bray were grossly disproportionate and violated the Eighth Amendment.'''

'''There are only two possible distinctions between these cases and Andrade. First, Andrade received 50 years in prison, whereas Brown and Bray received sentences of 25 years to life. But under California law, a sentence of 25 years to life, like that imposed on Andrade, is deemed to be an "indeterminate life sentence." Andrade, 270 F.3d at 747-748; People v. Dozier, 93 Cal.Rptr. 600, 605-606 (2000). Under California law, Bray and Brown are not eligible for parole until they have served 25 years of their sentence. In re Cervera, 16 P.3d 176, 177 (Cal. 2000). In fact, Andrade, Brown, and Bray each received a sentence of 25 years to life for each count of petty theft with a prior; the only difference is that Andrade was convicted of two counts and thus sentenced to two consecutive terms of 25 years to life.

Second, each case involved different prior offenses: Andrade's prior offenses included three burglary convictions; Bray's prior offenses included four robberies a decade or more earlier, and Brown's prior offenses included two burglaries and two counts of assault with a deadly weapon 19 and 13 years before the conviction for petty theft with a prior.

The different nature of the priors is immaterial. As the Ninth Circuit ruled, Bray and Brown cannot be

Because the Ninth Circuit's decision was entirely based on Andrade, these cases should be held pending this Court's decision in Andrade. The issue presented in this matter is the same as that presented in Andrade and Ewing: does it violate the Eighth Amendment to impose an indeterminate life sentence for shoplifting a small amount of merchandise?

Moreover, the habeas corpus issues presented in the State's petition for certiorari are the same as those raised in the State's certiorari petition in Andrade. In both Andrade and this case, the State of California

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punished now for their earlier offenses. Appendix A, at 24-25. That unquestionably would violate the Constitution's prohibition on double jeopardy. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 717-718 (1969); Ex parte Lange, 85 U.S. 163, 172 (1873) (double jeopardy is violated if there is subsequent punishment for the same offense). Nor can a defendant be punished for the "status" of being a felon. See, e.g., Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660, 667 (1962) (status cannot constitutionally be made a crime). Therefore, this punishment must be proportionate for this offense, while taking into account the individual's prior criminal record. As the Court declared in Solem v. Helm, 463 U.S. 277, 290 (1983): "[A] criminal sentence must be proportionate to the crime for which the defendant has been convicted." As the Ninth Circuit properly held, the issue is not what the defendants did previously, but rather, whether imposing a life sentence for misdemeanor shoplifting is cruel and unusual punishment.

is asking this Court to decide whether the Ninth Circuit erred in deciding that the California Court of Appeal decision was "contrary to" and an "unreasonable application" of clearly established federal law. In both petitions for certiorari, the State asks this Court to decide whether it is appropriate for a federal court should determine whether a state court decision is erroneous before deciding whether it is contrary to or an unreasonable application of federal law. Because certiorari has been granted on these exact issues in Andrade, review in this case is unnecessary.

Thus, because the Ninth Circuit's decision in this case was expressly based on Andrade and because the issues presented are, to a very large extent, the same as in Andrade and Ewing, this Court should hold this matter pending its decision in Andrade and Ewing.

Conclusion

For the foregoing reasons, respondents Richard Brown and Ernest Bray urge this Court to deny the petition for a writ of certiorari.

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I, Erwin Chemerinsky, a member of the Bar of this Court, hereby certify that on the 9th day of May 2002, three copies of the Brief in Opposition to Petition for Writ of Certiorari, were mailed, first class postage prepaid, to:

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No. 01-1487

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IN THE SUPREME COURT OF THE UNITED STATES

D. A. MAYLE, Warden, *Petitioner,*
v.
RICHARD N. BROWN, *Respondent.*

EDDIE YLST, Warden, *Petitioner,*
v.
ERNEST BRAY, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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ARGUMENT

SUPREME COURT REVIEW IS NEEDED IN THIS CASE, NOTWITHSTANDING THIS COURT'S GRANTING OF CERTIORARI IN *ANDRADE v. LOCKYER* AND *EWING v. CALIFORNIA*

Respondents oppose the petition for a writ of certiorari, arguing that the Ninth Circuit Court of Appeals decision was correct. More specifically, they contend that the state courts' determinations that the Eighth Amendment permits punishment of felonious petty theft by a term of 25 years to life when the defendant has a violent and extensive criminal history were "contrary to" and "unreasonable applications" of clearly established United States Supreme Court precedent. For this reason, Respondents conclude, the case is not worthy of Supreme Court review.

This Court recently granted certiorari in *Lockyer v. Andrade*, 122 S. Ct. 1434 (U.S. Apr. 1, 2002) (NO. 01-1127), and *Ewing v. California*, 122 S. Ct. 1435 (U.S. Apr. 1, 2002) (NO. 01-6978). In *Andrade*, the defendant received a 50-years-to-life sentence for his two concurrent convictions for petty theft. The Ninth Circuit ruled that the state court's decision that the sentence was constitutional was an unreasonable application of controlling federal precedent. In *Ewing*, the state appellate court upheld a 25-years-to-life sentence for a defendant convicted of grand theft. The granting of certiorari in these cases demonstrates that the Eighth Amendment issue presented here warrants Supreme Court review.

Alternatively, Respondents argue that if certiorari is granted, the case "should be held in light of this Court's grant of certiorari in *Lockyer v. Andrade* and *Ewing v. California*." (Resp't Opp'n to Pet. for Writ of Cert. at 15.) This result, they contend, is appropriate because "the Ninth Circuit's decision in this case was expressly based on *Andrade* and because the

issues presented are, to a very large extent, the same as in *Andrade* and *Ewing* . . .." (*Id.* at 18.) Petitioners disagree.

Although the decision in this case subsumes the issues presented in *Andrade* – the constitutionality of a sentence imposed under the Three Strikes law for an offense of petty theft with a prior – its expansion of *Andrade's* holding to the present facts provides additional grounds and further justification for Supreme Court review. Andrade's prior convictions were for non-violent offenses. Both Brown and Bray, however, have extensive criminal histories that include numerous crimes of violence. (Pet. for Writ of Cert. at 4-5, 14.) The nature of these prior convictions may be relevant to the ultimate resolution of the Eighth Amendment question. *Solem v. Helm*, 463 U.S. 277, 296 n.21 (1983) (prior offense relevant to Eighth Amendment question); *id.* at 292-93 ("non-violent crimes are less serious than crimes marked by violence or the threat of violence."). Also, Andrade received a "sentence of 50 years to life" for his two concurrent convictions for petty theft, considerably longer than Brown's and Bray's 25-years-to-life sentences. The "harshness of the penalty" is a relevant factor to consider in deciding the constitutionality of a sentence. *Solem*, 463 U.S. at 292.[1/]

More importantly, review is needed to address the Ninth Circuit's erroneous ruling that partial analysis of a federal constitutional claim by a state court may be viewed as the deletion of a factor in a test established by the Supreme Court. *Brown v. Mayle*, 283 F.3d 1019, 1025 (9th Cir. 2002). Under this holding, a state court's failure to *explicitly* apply all of the analysis required by Supreme Court precedent renders the state court adjudication "contrary to" controlling federal precedent,

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1. This case also differs from *Ewing*. In that case, the defendant was convicted of grand theft, the first offense of which can constitute a felony. A first offense of petty theft, on the other hand, can only constitute a misdemeanor.

thereby bypassing AEDPA deference and permitting *de novo* federal review.[2/]

The California Court of Appeal in this case, however, cited *Harmelin v. Michigan*, 501 U.S. 957 (1991) as controlling authority on the Eighth Amendment claim, and briefly discussed the facts of that case. The court concluded that in light of *Harmelin* – upholding a sentence of life imprisonment without possibility of parole against a defendant convicted of possessing 672 grams of cocaine – "a term of 25 years to life for a person with defendant's record cannot be considered disproportional." (App. G.) The Ninth Circuit held that, notwithstanding the California Court of Appeal's application of *Harmelin*, the leading Supreme Court decision on cruel and unusual punishment, its absence of an explicit discussion of some of the required Supreme Court analysis rendered the adjudication "contrary to" controlling federal precedent. *Brown,* 283 F.3d at 1025 ("the state court decisions in both cases failed to apply some or all of the required Supreme Court analysis. . . ."); *id.* at 1039 ("Because the addition, deletion, or alteration of a factor in a test established by the Supreme Court constitutes a failure to apply controlling Supreme Court law, Brown's habeas petition, like Bray's, is properly resolved under the 'contrary to' clause of AEDPA.").

The California Court of Appeal did not apply an incorrect standard. Nor did it reach a result different than a Supreme Court case involving materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). At most, it did not *explicitly* discuss every factor relevant to

---

2. This issue is not presented in either *Andrade* or *Ewing*. The Ninth Circuit's decision in *Andrade* was based on application of the "unreasonable application" clause; the state court decision was not deemed "contrary to" controlling federal precedent. *Andrade*, 270 F.3d at 767 ("The California Court of Appeal's conclusion to the contrary resulted from an unreasonable application of clearly established Supreme Court law.") *Ewing* was not a federal habeas case and, thus, the "contrary to" clause of § 2254(d)(1) had no application.

deciding the Eighth Amendment question. As Petitioners previously argued, nothing in the phrase "adjudicated on the merits" *in 28 U.S.C.* § 2254(d)(1) requires state courts to completely explain their reasoning process. (Pet. for Writ of Cert. at 25.) In fact, nine other federal circuit courts of appeals have ruled that state court adjudications are entitled to deference even when they provide no reasoning at all. (*Id.* at 25-26.) "It would be odd to require a less deferential approach to reasonableness in cases where the state courts attempted to articulate reasons for their decisions than in those where they did not." *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001).

For these reasons, the petition for writ of certiorari should be granted.

CONCLUSION

For the stated reasons, the petition for a writ of certiorari should be granted.

Dated: May 16, 2002

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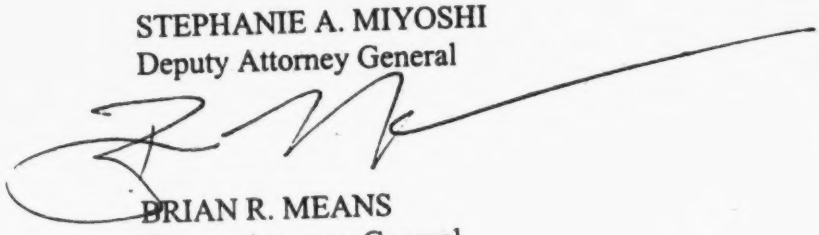

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